87-1354

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,
Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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37pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a libel suit brought by a public figure corporation and involving commentary on a matter of public concern, the award of presumed and punitive damages is barred by the First, Eighth and Fourteenth Amendments to the U.S. Constitution where there is no evidence of actual injury to the plaintiff.

2. Whether, in such a case, a finding of actual malice under *New York Times Co. v. Sullivan* is insufficient to justify the imposition of presumed and punitive damages.

3. Whether the Court of Appeals' finding of actual malice fails the constitutional test of convincing clarity where it is based, in substantial part, on presumptions from missing documents and on the broadcaster's "admission" that he neither believed nor intended the defamatory interpretation argued by the plaintiff.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 827 F.2d 1119 (7th Cir. 1987) and is reproduced at Appendix pp. 1a-49a. The opinion of the U.S. District Court for the Northern District of Illinois on post-trial motions is reported at 644 F. Supp. 1240 (N.D. Ill. 1986) and is reproduced at Appendix pp. 77a-124a. A prior opinion of the Seventh Circuit in this case is reported at 713 F.2d 262 (7th Cir. 1983) and is reproduced at Appendix pp. 55a-75a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Seventh Circuit was entered on August 12, 1987. A timely Petition for Rehearing was denied on November

16, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the First, Eighth, and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. Amend. I.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend XIV, § 1.

STATEMENT OF THE CASE

This petition seeks review of a $3,050,000 libel judgment consisting entirely of presumed and punitive damages. No actual damage to the plaintiff, a public figure, was shown. The alleged libel was a commentary by Walter Jacobson [1] on the subject of cigarette advertising and its appeal to young people, which was based on Jacobson's interpretation of a Federal Trade Commission (FTC) report.

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[1] Walter Jacobson is a news anchorman and commentator for WBBM-TV, the Chicago television station that broadcast the alleged libel. CBS Inc. is licensed by the FCC to operate WBBM-TV. CBS Inc. has the following subsidiaries (other than wholly owned subsidiaries): The CBS/FOX Co., CBS/FOX VIDEO Ltd., CBS/MTM Co., Mainstream Communications Corp., and Maindata, Inc. CBS Inc. has no parent companies or affiliates. All parties to the proceedings below are named in the caption.

The plaintiff, Brown & Williamson Tobacco Corporation ("B&W")[2] complained that the broadcast accused B&W of currently using "pot, wine, beer and sex" themes in its advertising to attract young smokers. This accusation was neither intended nor expressly stated in the broadcast. The lower courts, however, accepted B&W's interpretation and found evidence of actual malice, in part, from Jacobson's "admission" that the interpretation he never intended was false.

A. The Broadcast.[3]

The alleged libel was broadcast in the course of "Walter Jacobson's Perspective," a regular feature of the WBBM-TV evening news during which Mr. Jacobson offers his commentary on topics of public interest. The Perspective in question was the last of three dealing with the cigarette industry which were broadcast during the week of November 9, 1981.

Jacobson began by describing in sarcastic terms various cigarette marketing techniques that he believed were intended to appeal to young people. The focus of B&W's complaint was on the portion of the broadcast that followed:

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.
>
> That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising. [sic] The Viceroy strat-

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[2] B&W is a large corporation that manufactures and markets "Viceroy," "Kool," and other brands of cigarettes.

[3] A complete transcript of the broadcast as aired is included at Appendix pp. 129a-131a.

egy for attracting young people (starters they are called) to smoking.

"For the young smoker, a cigarette falls into the same category with wine, beer, shaving or wearing a bra," says the Viceroy strategy. "A declaration of independence and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarette as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, sex. Do not communicate health or health-related points."

That's the strategy of the cigarette slicksters, the cigarette business which is insisting in public . . . we are not selling cigarettes to children.

They're not slicksters, they're liars.

App. at 130a-131a (ellipsis in original).

B. Preparation of the Broadcast.

1. *The FTC Report.*

The broadcast was based in large part on confidential portions of a May, 1981 Federal Trade Commission staff report on its cigarette advertising investigation ("FTC Report").[4] The FTC Report quotes a report prepared by Marketing & Research Counselors, Inc. ("MARC"), which summarized research done "to assist [B&W's] ad agency in developing a marketable image for Viceroy cigarettes." App. at 133a. One chapter of the MARC report "focuses almost exclusively on how to persuade young people to smoke." It "recommends a strategy for attracting young 'starters' to cigarette smoking," which includes the language quoted in Jacobson's broadcast. *Id.* at 135a.

[4] Relevant portions of the FTC Report are excerpted at Appendix pp. 132a-141a.

The FTC Report states that "B&W adopted many of the ideas contained in this report in the development of a Viceroy advertising campaign" that ran for six months in three test cities with an advertising budget ten times the normal amount for such a time period. *Id.* at 136a, 137a n.47. The FTC report also states that

> *B&W documents also show that it translated the advice on how to attract young "starters" into an advertising campaign* featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a "free and easy, hedonistic lifestyle."

Id. at 137a (emphasis added). The "B&W documents" are identified as "Viceroy Marketing/Advertising Strategy." *Id.* at n.48.

2. *Investigation.*

Michael Radutzky, a researcher at WBBM-TV, obtained portions of the FTC Report from a reporter at the Lexington, Kentucky *Herald-Leader*, which had already published a story on the subject entitled "How Brown & Williamson Plotted to Fool Public." He also reviewed a series of articles by syndicated columnist Jack Anderson, which publicized details of the FTC Report and the MARC Viceroy strategy and corroborated the facts in the *Herald-Leader* article.

Radutzky confirmed the authenticity of his partial copy of the FTC Report with the FTC and congressional staff members involved in the cigarette advertising investigation. He also asked for copies of the documents and advertisements mentioned in the report, but these were refused because of confidentiality restrictions imposed during the FTC investigatory process.

Radutzky called Thomas Humber, a public relations officer for B&W, for comment on the FTC Report. According to Humber's memo prepared for B&W management and in-house counsel, he told Radutzky that B&W

had rejected the MARC recommendations, had never requested any advertising based on them, and had terminated the ad agency's work on the Viceroy account, partly as a result of B&W's dissatisfaction with the MARC report. According to the memo, Humber also told Radutzky that he had "thus far been unable to find copies of the proposed ads" and that "to the best of our knowledge no ads as described by the memo were ever actually published." When Radutzky questioned these claims in light of the FTC's conclusion that B&W had adopted many of the MARC recommendations and had translated them into an advertising campaign, Humber's answer, off-the-record, was that he believed the FTC staff was comprised of confirmed antismokers.

Based on this research, Radutzky drafted a preliminary script, from which he and Jacobson planned the final version of the broadcast, including the "visuals" that would be used on the screen during Jacobson's commentary. For the FTC portion Jacobson wanted to use an illustration of the strategy, but Radutzky reported that the ads themselves were unavailable and he was unable to find another example. Excerpts of the FTC Report were therefore shown, with a logo in the bottom right corner of the screen composed of a Viceroy pack and golf ball and clubs copied from a Viceroy ad.

The final script was prepared by Walter Jacobson and broadcast November 11, 1981.

C. Procedural History.

B&W filed suit for libel against Jacobson and CBS in the United States District Court for the Northern District of Illinois on March 16, 1982. On July 6, 1982, the District Court granted petitioners' motion to dismiss the complaint on several grounds, including, *inter alia*, that the broadcast was a fair summary of the FTC report and was capable of innocent construction under

Illinois law.[5] The Court of Appeals for the Seventh Circuit rejected the fair summary and innocent construction arguments and reversed the dismissal without addressing any constitutional issues, 713 F.2d 262 (7th Cir. 1983) (App. at 55a), and the action proceeded to trial.

The action was tried to a jury in a proceeding bifurcated as to liability and damages. At trial, CBS and Jacobson attempted to show that reference to the FTC report on the "Viceroy strategy" was not intended to describe current Viceroy advertising, but was intended to support their opinion that cigarette marketing reflects a conscious strategy to appeal to young people, and to refute the industry's protestations to the contrary. Petitioners also attempted to show that, in any event, B&W *did* attempt to implement the strategy in published test market advertising, as reported by the FTC. The district court's rulings barred petitioners from developing either of these theories before the jury.[6] As a result, the case

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[5] The district court also stated that "to deny this motion would unduly restrict the freedom of the press and the right of a journalist to express opinions freely." App. at 125a.

The destruction of Radutzky's notes, which figured prominently in the later decision of the Court of Appeals, occurred at this point, when Radutzky believed the case was over.

[6] Petitioners had earlier moved for summary judgment on the ground, *inter alia*, that Jacobson's statement "They're not slicksters, they're liars" was an expression of opinion in the context of the broadcast. The motion was denied. In the course of the trial the court admonished counsel and the jury that the issue of opinion had been ruled out of the case and "that the issues in this case are fact not opinion."

The district court also refused to admit into evidence the final MARC report, which included draft advertisements based on the earlier MARC recommendations, because the draft ads themselves had never been published in the media. The excluded final MARC report illustrates the evolution of the MARC Viceroy strategy from obvious sexual and hedonistic themes in the draft ads headlined, "If You Don't Have a Hang-up About Pleasure," to the more polished and subtle versions that *were* published under the caption, "If It Feels Good, Do It, If It Feels Good Smoke It." The final

was submitted to the jury on B&W's interpretation that the broadcast accused it of publishing current advertisements featuring pot, wine, beer and sex themes.

The jury returned a verdict in favor of B&W on liability. During the damage phase of the proceedings, B&W offered no evidence of actual injury resulting from the broadcast.[7] The jury awarded compensatory damages of $3,000,000 against both defendants and punitive damages of $2,000,000 against CBS and $50,000 against Jacobson.

On post-trial motions, the District Court entered judgment N.O.V. as to the compensatory award, reducing it to nominal damages of $1 because of B&W's failure to prove any actual damage from the broadcast.[8]

On appeal, the Court of Appeals affirmed liability, reinstated $1,000,000 as presumed damages, and affirmed the award of punitive damages. The court found that petitioners acted with actual malice because Jacobson's use of the words "Viceroy says" and "the Viceroy strategy" could be interpreted as attributing the pot, wine, beer and sex language to B&W as a current advertising strategy, even though he was aware: (1) that the FTC Report quoted from the Viceroy strategy prepared by MARC; (2) that B&W denied implementing the strategy; and (3) that Radutzky had found no Viceroy ads featuring

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MARC report itself and its accompanying documents refuted B&W's claim that it had rejected the MARC recommendations out of hand.

[7] B&W's only evidence of damage was a third-hand report that some customers reacted negatively following the broadcast; a second-hand report that employees were "shocked" by the broadcast; testimony by a former B&W senior vice president that the broadcast upset his son; and, finally, testimony that any criticism of the tobacco industry may have a tendency to harm the relationship of the industry in general with government regulators.

[8] The district court's opinion on post trial motions is included at Appendix pp. 77a-124a.

"pot, wine, beer and sex." The Court of Appeals found "the most compelling evidence of actual malice" to be Radutzky's destruction of notes, drafts and background materials after he learned the complaint had been dismissed by the district court.

Petitioners' timely petition for rehearing en banc was denied November 16, 1987. App. at 127a. Their motion for stay of judgment pending review by this Court was also denied. App. at 50a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with its clearest opportunity to define constitutional limits on the award of presumed and punitive damages for libel where both *public issues* and *public figures* are involved. This is the third and final step in the Court's analysis which began in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (prohibiting presumed and punitive damages in *public* issue/*private* figure cases)[9] and continued in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (permitting such damages in *private* issue/*private* figure cases).

In both cases, the Court "balance[d] the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting th[e] type of expression" involved. 472 U.S. at 757 (Powell, J., plurality opinion joined by Rehnquist and O'Connor, JJ.). The Court permitted the award in *Dun & Bradstreet* because it had only an "incidental effect . . . on speech of significantly less constitutional interest" than the public issues involved in *Gertz*.

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[9] This prohibition was qualified by the words, "*at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U.S. at 349 (emphasis added). The implications of this clause are discussed at pp. 15-19, *infra*.

Id. at 760.[10] In both cases, however, the Court reaffirmed the strong First Amendment protection of speech on *public* issues and "the limited state interest present in the context of libel actions brought by *public* persons." *Id.* at 756 (quoting *Gertz*, 418 U.S. at 343). The Court has not yet applied its *Gertz/Dun & Bradstreet* analysis to address the constitutionality of presumed and punitive damages in the context of a libel suit involving public figures and public issues.[11] This is the critical issue left open by both decisions and involves speech of the greatest constitutional interest. It should be resolved by the Court.

This case presents the issue in the sharpest possible focus. It involves commentary and opinion on a matter of the highest public concern—cigarette advertising and its appeal to young people. The plaintiff is a public figure corporation—not an individual—actively involved in the controversy, with a huge advertising budget and ready access to national and local media. There was no competent evidence of actual injury to the corporation, yet it received an award of more than $3,000,000—larger

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[10] Even in the context of this *private* libel, however, four members of the Court questioned the constitutionality of presumed and punitive damages. 472 U.S. at 793-794 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens). A fifth member, Justice White, also suggested that First Amendment interests might be served by limiting or entirely prohibiting presumed and punitive damages, as an alternative to the *New York Times* rule. *Id.* at 771 (White, J., concurring in the judgment).

[11] In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 161 (1967), Justice Harlan, writing for a plurality of the Court, rejected First Amendment arguments against a punitive damage award of $400,000 on grounds that the finding of "ill will" required under general libel law, coupled with a heightened standard of liability, was sufficient protection for publishers. However, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), he expressly retreated from that opinion: "Reflection has convinced me . . . that a more precise balancing of the conflicting interests involved is called for in this delicate area." 403 U.S. at 72 n.3 (Harlan, J., dissenting). His dissent in *Rosenbloom* became the cornerstone of the Court's analysis in *Gertz*. See discussion at pp. 18-19, *infra*.

than any libel award ever upheld by this Court—composed entirely of presumed and punitive damages. These facts present the strongest possible argument against the constitutionality of presumed and punitive damages in such libel cases.

I. PRESUMED AND PUNITIVE DAMAGES CONFLICT WITH FIRST AMENDMENT PROTECTION IN LIBEL CASES INVOLVING PUBLIC FIGURES AND PUBLIC ISSUES.

A. First Amendment Interests Are Strongest Where Commentary on Public Issues and Public Figures Is Involved.

The Court has consistently recognized that:

> [S]peech on " 'matters of public concern' " . . . is "at the heart of the First Amendment's protection." . . . . " '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the " 'highest rung of the hierarchy of First Amendment values,' " and its entitled to special protection.

Dun & Bradstreet, 472 U.S. at 758-59 (quoting *First National Bank v. Bellotti*, 435 U.S. 765 (1978) and *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (citations omitted).

Where, as here, speech on public affairs also includes discussion of governmental activities,[12] public figures,[13] and editorial commentary,[14] the balance weighs even more heavily in favor of free speech.

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[12] *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975); *Time, Inc. v. Pape*, 401 U.S. 279, 291 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970).

[13] *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result); *Gertz*, 418 U.S. at 337.

[14] *See FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984); *see also Gertz*, 418 U.S. at 359-60 (Douglas, J., dissenting) (this type of speech "is the reason for the First Amendment since speech which arouses little emotion is little in need of protection").

This Court has found that each of the factors involved in the present case—*i.e.*, discussion of public affairs, interpretation of governmental activities, criticism of public figures, and editorial comment and opinion—*standing alone*, justifies heightened protection under the First Amendment. Where all these elements are combined, only the most compelling state interest could conceivably tip the scales in favor of presumed and punitive damages. No such interest is present here.

B. State Interests in Awarding Presumed and Punitive Damages Are Weakest Where Commentary on Public Issues and Public Figures Are Involved.

Whatever justifications may be offered for presumed and punitive damages in the context of purely private libel are substantially undercut where discussion of public affairs and criticism of public figures is involved. Even in a private figure case involving speech of public interest, the Court in *Gertz* recognized that the "strong and legitimate state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury," 418 U.S. at 348-49, and barred the recovery of presumed or punitive damages.[15] The Court reasoned:

> [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, *the States have no substantial interest* in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

Id. at 349 (emphasis added).

On the subject of punitive damages, the Court stated:

> Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacer-

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[15] *See* note 9, *supra*, and discussion at pp. 15-19, *infra*.

> bates the danger of media self-censorship, but, unlike the former rule, punitive damages are *wholly irrelevant to the state interest* that justifies a negligence standard for private defamation actions. They are not compensation for injury.

Id. at 350 (emphasis added). Stated simply, presumed and punitive damages in libel cases deter speech, and the States have *no* legitimate interest in deterring speech on public issues. The underlying theme of this Court's libel decisions since *New York Times Co. v. Sullivan* has been the need to *encourage* free and open debate and to prevent self-censorship. *See Gertz*, 418 U.S. at 350; *see also Near v. Minnesota*, 283 U.S. 697, 713-20 (1931).

Where, as here, the libel plaintiff is a corporation, there is even less justification for presumed damages, as four members of this Court recognized in *Dun & Bradstreet*, 472 U.S. at 793 n.16 (Brennan, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens). Even the Court of Appeals recognized the irrelevance of B&W's proffered testimony that its employees were emotionally upset: "a corporation is not capable of mental suffering, which ordinarily will be an important component of an individual's damage award for libel." App. at 40a.

Finally, as clearly stated in *Gertz*, the state interest in providing *any* compensation to the plaintiff in a public figure libel proceeding is diminished by the fact that public figures usually have greater access to the media to counter false publicity. 418 U.S. at 344; *see also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). It was the lack of such access by private figures and the perceived need to provide another remedy that led the Court in *Gertz* to permit recovery under a lesser standard than the *New York Times* rule. Even there, however, recovery was limited to compensation for actual injury.

The respondent in the present case, Brown & Williamson, is not merely a public figure. It is a large corpora-

tion that has ready access to the media. It has also been a central and newsworthy figure in the public policy debate concerning smoking and public health, and has more than adequate opportunity to present its side of these issues and to enhance its corporate image through the news media and its own advertising and public relations activities. Under these circumstances the state has no substantial interest in providing monetary awards under such an elusive concept as general damage to corporate reputation, and no interest in awarding presumed and punitive damages where free discussion of public affairs is at stake.

C. The State Has No Legitimate Interest in Providing Compensation for Defamation Where No Actual Injury Is Shown.

The conclusion to be drawn from the Court's analysis in *Gertz* and *Dun & Bradstreet* is that presumed and punitive damages should be prohibited in all cases involving public figures and matters of public interest.[16] But in any event, they should not be awarded in a case such as this, where B&W failed to prove actual injury to its reputation.

Gertz stressed that the state interest in defamation law "extends no further than compensation for *actual injury*." 418 U.S. at 348-49 (emphasis added). If no actual injury is shown, there is no countervailing state interest justifying the burden that an award of damages imposes on free expression. Indeed, the Court suggested in *Gertz* that in the absence of such a state interest:

> this Court would have embraced long ago the view that publishers and broadcasters enjoy an uncondi-

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[16] This view was expressed, even in the context of a private individual plaintiff, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) by Justices Marshall and Stewart. *Id.* at 84, (Marshall, J., dissenting). Justice Marshall joined the majority opinion in *Gertz*. *See also Dun & Bradstreet*, 472 at 771, (White, J., concurring in the judgment).

tional and indefeasible immunity from liability for defamation.

Id. at 341.

At a minimum, where the plaintiff is a public figure *corporation* that has suffered no provable harm, as in this case, the proper balance between First Amendment and defamation law interests falls at the opposite end of the scale from the balance struck by the plurality in *Dun & Bradstreet*.

II. PRESUMED AND PUNITIVE DAMAGES ARE NOT JUSTIFIED BY THE LOWER COURTS' FINDING OF ACTUAL MALICE.

In *Gertz*, this Court prohibited presumed and punitive damages in a *private* figure case, "*at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349 (emphasis added). The Court did not hold that such damages would automatically flow whenever actual malice could be shown; the question simply was not discussed. Rather, with this language the Court carefully confined its holding in *Gertz* to cases involving "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times*." *Id.* at 350.[17]

More importantly, neither *Gertz* nor the subsequent decision in *Dun & Bradstreet* addressed this question in the context of a public figure/public concern libel case, where liability itself is premised on actual malice.

A. There Is No Rational Correlation Between Actual Malice and Presumed Damages.

The doctrine of presumed damages, which allows recovery without evidence of actual injury, was effectively

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[17] *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847 n.4 (1985) and cases cited therein ("*Gertz* did not conclusively establish the constitutionality of punitive damages in libel actions").

laid to rest in *Gertz*. The States have *no* substantial interest in awarding damages in excess of actual injury, 418 U.S. at 349; therefore, "all awards must be supported by competent evidence concerning the injury." *Id.* at 350. These conclusions do not magically dissolve where the applicable standard of liability is actual malice. Actual injury to the plaintiff (or lack of it) does not change; the plaintiff's opportunity to demonstrate elements of injury catalogued in *Gertz* is not diminished; nor is the ability of trial courts to frame instructions appropriate to the alleged injury. *Id.* at 350.

Presumed damages in libel cases are nothing more than a vestigial aspect of strict liability, clearly prohibited by the Court in *Gertz*. Strict liability under the common law of libel resulted from a finding that speech in question was "libelous per se," from which the jury was allowed to *presume* falsity, malice, *and damages*. *See Gertz*, 418 U.S. at 371-75 (White, J., dissenting); *see generally* R. Sack, *Libel, Slander, and Related Problems* 39-43 (1980). It was solely on the basis of this now-discredited logic that the Court of Appeals awarded presumed damages of $1,000,000 in the present case:

> Brown and Williamson is entitled in this case to recover under the doctrine of presumed damages *because Jacobson's Perspective was libelous per se.*

App. at p. 40a (emphasis added). No connection was, or could be, suggested between the availability of *presumed* damages in this case and the finding of actual malice.

B. The Lower Courts' Finding of Actual Malice Does Not Justify Punitive Damages.

There *is* an arguable connection between the rationale for *punitive* damages and the truly intentional publication of falsehoods, but such intentional conduct is often missing from findings of actual malice by the lower courts. All too often, the actual malice rule is treated

as nothing more than a semantic hurdle easily overcome by those who would punish "unfair" or "irresponsible" news coverage.[18] When such a finding is also allowed to determine the availability of punitive damages, without any evidence of malice in the traditional sense, the end result is punishment of speech on a *lesser* standard than is applied to the award of punitive damages in other cases. *See Smith v. Wade*, 461 U.S. 30 (1983). Justice Harlan found such a result unjustifiable under "[any] conceivable state interest." *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 73 (1971) (Harlan, J., dissenting).

To some extent, this confusion in the lower courts is understandable. In the early cases following adoption of the actual malice rule in *New York Times*, the Court struggled to educate the lower courts that evidence of ill will, enmity, and intent to inflict harm were not sufficient to establish "actual malice." *See Garrison v. Louisiana*, 379 U.S. at 73; *see also Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Henry v. Collins*, 380 U.S. 356 (1965). From the language of these cases, some courts and commentators have reached the illogical conclusion that "actual malice" does not mean malice at all, and can be established without any indication of intent to harm.[19] A closer reading of this Court's decisions, however, demonstrates that the Court has always intended the rule to reach only truly "malicious" conduct.

From the very beginning, the *New York Times* actual malice rule was intended to protect negligent falsehoods, *New York Times*, 376 U.S. at 271, 272, errors in judgment and interpretation, *Time, Inc. v. Pape*, 401 U.S. at

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[18] *See* Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. of Bar of City of New York 20, 32-36 (Jan./Feb. 1987).

[19] *See* Note, *Punitive Damages and Libel Law*, *supra*, note 17, at 854-55; Report, Committee on Communications Law, *supra* note 18, at 32-36.

292, and even falsehoods that might have been avoided through reasonable investigation, *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968), as long as such conduct did not rise to the level of "deliberate lies" and "calculated falsehoods" uttered with a "high degree of awareness of probable falsity." *Garrison*, 379 U.S. at 74-75. Under these cases, it was the "intent to inflict harm through falsehood" that demonstrated actual malice. *Id.* at 73. The Court has consistently rejected technical arguments of "knowing falsehood" and labels of "reckless disregard" where these elements are missing. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513 (1984); *Time, Inc. v. Pape*, 401 U.S. at 291; *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970).

Justice Harlan's dissenting opinion in *Rosenbloom*, which "formed the cornerstone of the Court's analysis in *Gertz*," *Dun & Bradstreet*, 472 U.S. at 779 (Brennan, J., dissenting) is consistent with this reading of the rule. Justice Harlan expressed what he believed was the *minimum* constitutional restriction on punitive damages as:

> *At a minimum*, even in the *purely private* libel area, I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved.

Rosenbloom, 403 U.S. at 73 (emphasis added). But it is clear from the language immediately following this quotation that his reference to "actual malice" also contemplated malice in the traditional sense:

> This [actual malice] is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms

> that are given explicit protection by the First Amendment.

403 U.S. at 73; *see also Dun & Bradstreet*, 472 U.S. at 780 n.4 (Brennan, J., dissenting).

Unless the Court acts, at very least, to limit the availability of punitive damages to those cases of truly malicious conduct involving deliberate lies or calculated falsehoods, the actual malice rule will remain in danger of being used not as a constitutional shield for free speech, but as a weapon used by plaintiffs to exact heavy punishment for innocent errors of judgment and interpretation.

This case provides a striking example of such a result. The Seventh Circuit's analysis of actual malice is almost indistinguishable from the Seventh Circuit's approach condemned by this Court in *Time, Inc. v. Pape*, 401 U.S. at 291:

> This protection [of the *New York Times* rule] would not exist for errors of interpretation were the analysis of the Court of Appeals to be adopted, for once a jury was satisfied that the interpretation was "wrong," the error itself would be sufficient to justify a verdict for the plaintiff.

As in *Pape*, the Court of Appeals relied primarily upon petitioners' alleged misinterpretation of a government report to establish both falsity and "actual malice." Punitive damages were upheld solely as a matter of state law, and solely because of the presence of actual malice: "Punitive damages are available under Illinois law when a plaintiff has proven actual malice." App. at 47a. If *certiorari* is not granted, this result in a case involving a major public figure, an issue of the highest public concern, and a multimillion dollar damage award without proof of any actual injury, will stand as the law in the Seventh Circuit and as a disastrous precedent for other courts.

III. THIS RECORD DOES NOT ESTABLISH WITH CONVINCING CLARITY THAT FALSE STATEMENTS WERE MADE WITH ACTUAL MALICE.

The Court of Appeals reasoned that its finding of falsity and actual malice stripped this case of all First Amendment considerations:

> [T]his case does not involve freedom of the press . . . [b]ecause false statements of fact made with actual malice are not protected by the First Amendment.

App. at 49a. This Court's independent review of these findings required under *New York Times* and *Bose*,[20] is therefore especially critical, as they are tied directly to the damage awards at issue. Review is also critical because the Court of Appeals, despite its declared intent to provide petitioners "the fullest possible review," App. at 49a, overlooked or misread key evidence in its attempt to rationalize the finding of actual malice.

The Court of Appeals found proof of actual malice in "the distortion of the FTC Report, Brown & Williamson's denial, and the corroboration of the denial," together with the "unexplained selective destruction" of notes and background materials by Radutzky. App. at 36a-37a. These characterizations do not accurately reflect the evidence, and they do not, either singly or in combination, establish actual malice with convincing clarity.

What the Court will find upon its independent review of the record is, at very most, an arguably mistaken belief by Jacobson that the makers of Viceroy had implemented a strategy, based on the MARC recommendations for reaching young smokers. The supposed "distortion" was in fact a perfectly reasonable interpretation of the FTC Report; B&W's "denial" was equivocal at best and contradicted by the FTC's findings; and Radutzky's so-

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[20] *See Bose Corp. v. Consumers Union*, 466 U.S. at 499; *New York Times Co. v. Sullivan*, 376 U.S. at 284-86.

called "document destruction" was neither "unexplained" nor "selective." More importantly, the lower court's findings of falsity and actual malice were based entirely on only one of several *interpretations* of the broadcast, not on clear misstatements of fact.

A. Actual Malice Is Not Established With Convincing Clarity Where the Finding of Falsity Is Based on Matters of Interpretation and Opinion.

In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), this Court conclusively established that the plaintiff in a defamation case involving matters of public concern must prove falsity of the challenged statements. 475 U.S. at 776. It logically follows from both the reasoning of that decision and sound First Amendment principles that where actual malice is involved, falsity must be shown with convincing clarity.[21] This means showing not only that the statements made were false, but also that the allegedly false statements were actually made.

The alleged falsehood in this case—that B&W featured pot, wine, beer and sex themes in its advertising, does not appear as a statement of fact anywhere in petitioner's broadcast. It depends entirely on B&W's interpretation and does not take into consideration other, more reasonable interpretations consistent with the expression of Jacobson's opinion that the cigarette industry's appeal to young people is intentional.

The lower courts in this case were unwilling to deal with the complex issues of opinion on any but the most

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[21] *See Hepps*, 475 U.S. at 773, 779 n.4; *Bose*, 466 U.S. at 511 (question on review is "whether the evidence in the record . . . is of the convicing clarity required to strip the utterance of First Amendment protection"); *Garrison v. Louisiana*, 379 U.S. at 74 ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned"); *see also Speiser v. Randall*, 357 U.S. 513, 525-526 (1958).

mechanical terms, particularly where interpretation of the entire broadcast was involved. *See* App. at 18a-22a and 103a-106a. They failed to recognize that issues of opinion are not technical defenses, but are inseparable from the determination of truth and falsity. *See Gertz*, 418 U.S. at 340; *see also Bose*, 466 U.S. at 514.

The facts of this case highlight the critical need for a clear ruling from this Court that falsity must be shown with convincing clarity in public figure/public interest libel actions, particularly where the free-wheeling rhetoric of commentary is open to interpretation. If statements concerning public figures and public affairs may legitimately be read as opinion, hyperbole, satire, or any other form of nonfactual speech, they must be given the breathing space necessary to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Liability must be confined to those utterances that are clearly and convincingly intended to convey false statements of fact. Indeed, this is the underlying rationale of this Court's holdings on the issues of "opinion" in *Gertz*, 418 U.S. at 339-340, and "rhetorical hyperbole" in *Greenbelt*, 398 U.S. at 14-15. Where, as here, the truth or falsity turns on legitimately disputed interpretation in the debate, the balance should be tipped in favor of First Amendment protection. *See Hepps*, 475 U.S. at 776-77.

B. The Court of Appeals' Finding of Actual Malice Is Not Supported by the Record.

1. *"Distortion" of the FTC Report.*

Jacobson used the phrases "Viceroy says" and "the Viceroy strategy" in quoting from the "pot, wine, beer and sex" language of the MARC Viceroy strategy. From this, the Court of Appeals found a knowing and intentional "distortion" of the FTC Report. However, Jacobson's presentation was at least a rational interpretation

of the FTC's conclusion that B&W *had* adopted many of MARC's ideas and "translated the advice on how to attract young 'starters' into an advertising campaign . . . demonstrating adherence to a 'free and easy, hedonistic lifestyle,'" based on evidence identified as "B&W documents" entitled "Viceroy Marketing/Advertising Strategy." App. at 137a & n.48.

The reasoning of the Court of Appeals repeats the very error condemned by this Court in *Time, Inc. v. Pape*, where a reporter's interpretation of a government report, "though arguably reflecting a misconception," was "one of a number of possible rational interpretations" of the report and was held not evidence of actual malice. 401 U.S. at 290. Otherwise, this Court concluded, the protection of the actual malice rule would be meaningless, "for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff." *Id.* at 291.

Given the facts of this case, this last observation by the Court was prophetic. The Court of Appeals held that actual malice was established by Jacobson's attribution of the MARC recommendations to Viceroy "since he admitted that he knew the statement was made by MARC rather than by Viceroy." App. at 33a.

2. *Brown & Williamson's Denial.*

B&W's denials did not give Jacobson and CBS any serious reason to doubt the accuracy of the broadcast. The statements by B&W's public relations officer were equivocal at best and were directly contradicted by the FTC's conclusion that B&W *had* published advertising based on the MARC recommendations. B&W's explanation for the discrepancy, that the FTC staff were "avid anti-smokers," did nothing to resolve the conflict.

Jacobson's decision to believe the FTC Report instead of B&W's public relations officer does not indicate sub-

jective doubts as to the accuracy of the broadcast. *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1112 (N.D. Cal. 1984).

3. *Failure to Find "Pot, Wine, Beer and Sex" Ads.*

The Court of Appeals accepted B&W's interpretation that the broadcast accused Viceroy of running pot, wine, beer and sex ads. From this misinterpretation the finding of actual malice followed as a matter of course: Radutzky found no ads featuring pot, wine, beer and sex, so he and Jacobson must have known that their accusation was false. Of course, if it is not clear that the accusation was intended, or even made, knowledge of falsity and evidence of actual malice also are not clear.

Radutzky and Jacobson believed from discussions with FTC and Congressional staff members that there were ads based on the MARC recommendations, and they knew from the FTC Report itself that Viceroy had run such an advertising campaign. No source except B&W suggested that such ads did not exist; they simply could not be made available because of confidentiality limitations on the FTC investigation. Failure to find examples of the strategy among current ads in the Chicago area [22] could not negate the FTC's conclusion that the Viceroy strategy had been adopted and translated into an advertising campaign, nor did it change Jacobson's belief that such a strategy existed.

4. *"Selective" Document Destruction.*

The Court of Appeals found Radutzky's destruction of documents the "most compelling evidence of actual malice." App. at 28a. According to the court, "Radutzky

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[22] The ads in question were run in Knoxville, Tennessee; Orlando, Florida; and Wichita, Kansas, facts that were unknown to Radutzky at the time.

had no explanation for why he destroyed only certain parts of the documents," and from this, the jury was "almost compelled" to conclude that Radutzky's explanation for destroying his notes "was a complete fabrication . . . [because] [n]obody cleans house as *selectively* as Radutzky did." App. at 31a (emphasis added). This misconception in turn led to the holding that "[b]ecause Radutzky destroyed the documents in bad faith, the jury was allowed to infer that the destroyed documents would have seriously damaged the defendants' case." *Id.* The court simply ignored Radutzky's explanation that he did not deliberately keep the documents that were eventually produced; rather, after the case was reinstated by the Seventh Circuit, he found the additional pages that were produced.

Even if the Court of Appeals' finding of bad faith is accepted for the sake of argument, the document destruction still does not supply the missing proof of actual malice. Destruction of documents gives rise to an inference against the party destroying the documents, but the inference "will not supply a want of proof of a particular fact essential to the proponent's case."[23] E. Cleary, *McCormick on Evidence* § 273 at 810 & n.20 (3d ed. 1984). Indeed, this Court has held that although discredited testimony may be disregarded by the trier of fact, it "does not constitute clear and convincing evidence of actual malice." *Bose*, 466 U.S. at 512; *see also Speiser v. Randall*, 357 U.S. at 526 ("The power to create presumptions is not a means of escape from constitutional restrictions").

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[23] Even this limited inference from Radutzky's destruction of documents does not arise against the petitioners here—Jacobson and CBS. The inference runs against the *party* responsible for the destruction. *Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985). Radutzky is not a party to this action. His actions cannot be imputed to Jacobson nor, under the normal rules of agency law, to CBS, because they were contrary to CBS policy.

IV. THE AWARD OF PRESUMED AND PUNITIVE DAMAGES ALSO VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The award of presumed and punitive damages in this case presents the Court with the same serious issues under the Due Process clause of the Fourteenth Amendment and Excessive Fines clause of the Eighth Amendment that it has already confronted in the ordinary tort context in *Banker's Life & Casualty Co. v. Crenshaw*, No. 85-1765 (oral argument Nov. 30, 1987) and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). However, when First Amendment values are involved, these concerns are magnified and are often subsumed in the First Amendment analysis. *See Gertz*, 418 U.S. at 350. Indeed, concerns about due process and excessive punishment of speech are persistent themes throughout this Court's libel decisions. In one sense, therefore, it is impossible to separate these issues from First Amendment considerations where the subject matter is speech on matters of public concern. In another sense, however, it is entirely possible to find that awards of presumed and punitive damages are unconstitutional solely on the basis of their failure to satisfy minimum requirements of due process and their tendency to be used as private civil fines in unrestrained and excessive amounts.

Due process requires, at a minimum, that economic burdens imposed by a state bear some rational relationship to a legitimate state interest and be imposed in a manner that is neither arbitrary nor irrational. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-77 (1985). Absence of the requisite state interest is discussed at pp. 12-15, *supra*. However, even if this substantive requirement could be met, due process also requires that the *procedures* by which such burdens are imposed be "adequate to safeguard against infringement of constitutionally protected rights." *Speiser v. Randall*, 357 U.S. 513, 521 (1958);

see Freedman v. Maryland, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959).[24] Despite the harshly punitive nature of these damage awards, libel defendants have none of the protections offered criminal defendants.[25]

Standardless and deferential appellate review aggravates the problem. Appellate courts generally refuse to disturb a jury's award of these damages that is not "monstrously excessive," "disproportionate," "destructive," "inflamed by passion and prejudice," or so large as to "shock the judicial conscience." None of these so-called standards would be adequate to sustain a criminal penalty against a due process challenge, yet they are regularly applied in review of punitive damage awards.[26] The rule has become "if it feels wrong, send it back."

The constitutional flaws of this kind of review are exemplified in the present case. The Court of Appeals held that because the jury had awarded *only* $5,050,000 of the over $17,000,000 presumed and punitive damages requested, it was not "mere putty in the hands of the plaintiff" and was not swayed by "passion and prejudice." App. at 45a. The Court of Appeals also sus-

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[24] *See also* Sack & Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dick. L. Rev. 609, 616 and n.46, 618 (1986); Report, Committee on Communications Law, *supra* note 18 at 37-40; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 288-291 (1983).

[25] *See New York Times v. Sullivan*, 376 U.S. at 277; *Bantam Books v. Sullivan*, 372 U.S. 58, 69-70 (1963); *see also Speiser v. Randall*, 357 U.S. at 521-522.

[26] *See Gertz*, 418 U.S. at 350; *Brown & Williamson v. Jacobson*, 827 F.2d at 1141; *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1143-44 (7th Cir. 1985), *cert. denied*, 475 U.S. 1094 (1986); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1275 (7th Cir. 1983); *Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984); *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1975).

tained the punitive damage award because it was not "destructive" and did not burden the defendants "with a debt that [they] cannot easily discharge." *Id.* at 48a.

The award of presumed damages was justified by the Court of Appeals with the remarkable assertion that $1,000,000 is not "substantial." The Court admitted that the " '[a]scertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation," *id.* at 41a (quoting *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511 (10th Cir. 1987)), and is inherently "very inexact and somewhat arbitrary," *id.* at 47a.

The same defects that should invalidate presumed and punitive damages under the Fourteenth Amendment are also fatal under the Eighth Amendment. Fines are "excessive" under the Eighth Amendment if they are disproportionate to the harm inflicted and to other punishments for the same conduct. *Solem v. Helm*, 463 U.S. 277, 284 (1983).[27] Presumed and punitive damage awards unconfined by any adequate standards result in disproportionate and excessive private fines. *See Gertz*, 418 U.S. at 349-50; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 82-83 (Marshall, J., dissenting); *see also* Report, Committee on Communications Law, *supra* note 18, at 39-40.

The Court is here confronted with a multimillion dollar judgment in favor of a public figure corporation that has suffered no provable damage, yet the award was upheld under vague rules that the jury not be "mere putty in the hands of the plaintiff" and that the punishment not be "destructive". Whether this is viewed as a problem of due process under the Fourteenth Amend-

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[27] Although *Solem* is a cruel and unusual punishment case, the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289.

ment, an excessive fine prohibited by the Eighth Amendment, or an infringement of the First Amendment, it is unquestionably an unconstitutional result that must be addressed by the Court.

CONCLUSION

Presumed and punitive damages are far too dangerous a weapon to be used against commentary on public concerns, especially where no actual injury to the public-figure plaintiff can be shown. The decision of the Court of Appeals, if left uncorrected, stands as a dangerous departure from both the letter and intent of this Court's decisions protecting discussion of public affairs. It permits massive damage awards without proof of actual injury; it finds actual malice based on inference, presumption, and differences of interpretation; and from this, it concludes that "this case does not involve freedom of the press." App. at 49a.

The result in this case not only *involves* freedom of the press; it threatens that freedom where it is most in need of protection, and should be reviewed by this Court.

Respectfully submitted,

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February 12, 1988

87 - 1354

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,
Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX INDEX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 86-2474 and 86-2475

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellee—Cross Appellant,

v.

WALTER JACOBSON and CBS, INC.,
Defendants-Appellants—Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 1648—William T. Hart, *Judge.*

ARGUED APRIL 3, 1987—DECIDED AUGUST 12, 1987

Before BAUER, *Chief Judge*, WOOD, JR., and POSNER, *Circuit Judges.*

BAUER, *Chief Judge.* This case is the sequel to *Brown & Williamson v. Jacobson*, 713 F.2d 262 (7th Cir. 1983), in which we reinstated a libel suit that had been brought by Brown & Williamson Tobacco Corporation, which produces and markets Viceroy cigarettes, against CBS, Inc. Following our remand, the district court held a jury trial that resulted in a verdict against CBS and an award of $3,000,000 in compensatory damages and an award of

$2,050,000 in punitive damages. Following post-trial motions, the district court reduced the compensatory damage award to $1.00 but upheld the punitive damage award. *See Brown & Williamson v. Jacobson*, 644 F. Supp. 1240 (N.D. Ill. 1986). We affirm the district court's decision on liability and punitive damages but reverse its compensatory damage ruling and reinstate $1,000,000 of the $3,000,000 originally awarded by the jury.

I.

The attitude of most knowledgeable and disinterested persons toward the tobacco industry is certainly negative; at least it has been negative for the past decade. In such an atmosphere, it becomes difficult to imagine how the tobacco people can be libeled. The bashing of the industry by government and private groups has become a virtual cottage industry. This case, however, demonstrates that general bum raps against the whole tobacco industry are different from specific accusations of skulduggery by a specific company or person. And this case involves some very specific statements against a very specific company in the tobacco industry. The facts are as follows: Walter Jacobson, an employee of the CBS-owned Chicago television station WBBM-TV, has served for a number of years as the co-anchor for the 10 p.m. weekday newscasts.[1] In addition to fulfilling his duties as an anchorman, Jacobson also delivers a nightly feature known as "Walter Jacobson's Perspective." When Jacobson delivers his Perspectives, he moves from his normal location at the anchor desk, which is located in the station's newsroom rather than in a separate studio, to a special "Perspective" section of the newsroom. During the feature, the word Perspective appears on the screen with Mr. Jacobson's signature below it. The Perspective segments

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[1] The 10 p.m. news follows prime time programming in the central time zone.

are rebroadcast the following day during WBBM's early evening news broadcasts.

As part of its activities promoting the quality of its news personalities, CBS ran ads which stated that "[w]ith ten years of experience on our anchor desk, [Walter Jacobson] has established himself as the city's most savvy political reporter . . . with contacts as solid as his credentials." Jacobson was touted by CBS as someone who "pulls no punches" and "lays it on the line." According to the ads, he is a journalist who will "make you angry. Or make you cheer. Walter Jacobson is liable to evoke all kinds of reactions . . . and he'll always leave you informed." When he delivered his Perspective on November 11, 1981, he made the Brown & Williamson Tobacco Corporation very angry.

Jacobson's November 11 Perspective was the third in a series on the cigarette industry. The first in the series dealt with the political influence of tobacco manufacturers while the second in the series discussed the failure of cigarette manufacturers to incorporate fire prevention features into their products. The final segment in the series, which was promoted on the day of the broadcast as "[t]obacco industry hooks children . . . Tonight at 10:00," dealt with the marketing practices of the cigarette industry. After Jacobson had moved to the Perspective section of the newsroom, his co-anchor, Harry Porterfield, introduced Jacobson's Perspective by stating:

> For the past two nights in Perspective, Walter has been reporting on the companies that make cigarettes and the clout they carry in Washington.
>
> Tonight he has the last in his series of special reports, a look at how the cigarette business gets its customers.

Jacobson then delivered his Perspective:

Ask the cigarette business how it gets its customers and you will be told over and over again, that it's hard these days to get customers; that the good old days are gone forever. The good old ads for cigarettes cannot be used anymore. Old St. Nick, for example, pushing Lucky Strikes because . . . "Luckies are easy on my throat." The cigarette business can't count on that kind of an ad anymore. Or the doctors pushing Camels; more doctors smoke Camels than any other cigarette. The business can't count on an ad like that anymore, either.

Nor can it count anymore on television. Pushing cigarettes on television is prohibited. Television is off limits to cigarettes. And so the business (the killer business) has gone to the ad business in New York for help; to the slicksters on Madison Avenue, with a billion dollars a year for bigger and better ways to sell cigarettes.

Go for the youth of America. Go get 'em, guys. Get some young women, give them some samples. Pass them out on the streets, for free, to the teenagers of America. Hook 'em while they're young. Make 'em start now. Just think how many cigarettes they'll be smoking when they grow up.

Oh, here's another cigarette-slicksters idea. The Merit report wants your opinion; a survey, they say, on current events. A $270,000 Merit wagon. Walk in, children, and let us know what you think about President Reagan. Get involved, children. Thank you, on behalf of Merit cigarettes. Or another cigarette-slicksters idea. Go for the children through sports. You'll never guess who's likely to be a winner at the Winter Olympics. How about Rudd Pyles, from Colorado? But better than that, how about Benson & Hedges? At-a-way. The best possible way to addict the children to poison. There are more

subtle ways, as well. A scene, for example, in Superman II. A bus crashing into a truck. Could be any truck, couldn't it? But, in a movie that's being seen by millions of children who love Superman, the bus crashes into a Marlboro truck.

Jacobson then reached the portion of his Perspective that the jury and the district court found libeled Brown & Williamson:

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.
>
> That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising [sic]. The Viceroy strategy for attracting young people (starters, they are called) to smoking.
>
> "For the young smoker a cigarette falls into the same category with wine, beer, shaving, or wearing a bra," says the Viceroy strategy. "A declaration of independence and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarete as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, and sex. Do not communicate health or health-related points."
>
> That's the strategy of the cigarette-slicksters, the cigarette's business which is insisting in public . . . we are not selling cigarettes to children.
>
> They're not slicksters. They're liars.

While Jacobson was making his statements about Viceroy, superimposed on the screen was a current Viceroy ad featuring two packs of Viceroy Rich Lights, a golf ball, and a part of a golf club. The relation of that particular ad to "pot, wine, beer, and sex" advertisements is not clear. Jacobson testified that the golf club ad was used only as a means of identifying the brand name for the viewer.

The "confidential report in the files of the federal government" referred to by Jacobson was a report by members of the staff of the Federal Trade Commission (FTC). The report first came to the attention of Jacobson's researcher, Michael Radutzky, in the summer of 1981 when Radutzky saw an article in a Kentucky newspaper that referred to the FTC report. Radutzky, who went on to become the producer of the 5:00 p.m. and then the 10:00 p.m. news at WBBM-TV, received copies of the pertinent pages of the FTC report from the author of the newspaper article.

The FTC report stated that documents obtained from Brown & Williamson and one of its advertising agencies, Ted Bates & Company, "set forth the development of an advertising strategy for Viceroy cigarettes designed to suppress or minimize public concern about the health effects of smoking." The report stated that the documents showed that Bates, which had the Viceroy account in 1975, requested a marketing and research firm, Marketing and Research Counselors, Inc., (MARC) to assist Bates in developing a marketable image for Viceroy cigarettes. After conducting a number of focus group interviews on the subject of smoking, MARC delivered a report, which was authored by N. Kennan, to Bates. The MARC report made recommendations on what its author thought were the important elements of a successful cigarette advertising campaign. As summarized by the FTC report, "the basic premise of the [MARC] re-

port's recommendations is that since there 'are not any real, absolute, positive qualities and attributes in a cigarette,' the most effective advertising is designed to 'reduce objections' to the product by presenting a picture or situation ambiguous enough to provide smokers with a rationale for their behavior and a means of repressing their health concerns about smoking."

The MARC report discussed in a later chapter how "starters" could be introduced to the Viceroy brand. The FTC report quoted the MARC report's discussion of how the young smoker related to cigarettes. "For them," the MARC report opined, "a cigarette, and the whole smoking process, is part of the illicit pleasure category. . . . In the young smoker's mind a cigarette falls into the same category with wine, beer, shaving, wearing a bra (or *purposely* not wearing one), declaration of independence and striving for self-identity. For the young starter, a cigarette is associated with introduction to sex life, with courtship, with smoking 'pot' and keeping late studying hours." FTC report at 17 (quoting MARC report) (emphasis in MARC report). The MARC report went on to suggest a strategy for attracting "starters" to the Viceroy brand based "on the following major parameters":

> Present the cigarette as one of a few initiations into the adult world.
>
> Present the cigarette as part of the illicit pleasure category of products and activities.
>
> In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process.
>
> To the best of your ability, (considering some legal constraints), relate the cigarette to "pot," wine, beer, sex etc.
>
> *Don't* communicate health or health-related points.

FTC report at 18 (quoting MARC report). The FTC report then stated that Brown & Williamson had adopted many of the ideas contained in the MARC report in the development of an advertising campaign for Viceroy. Specifically, the report noted that in a document it had received directly from Brown & Williamson, rather than from an advertising agency or a firm hired by the advertising agency, Brown & Williamson had indicated that it must prove consumers with a rationalization for smoking and a "means of repressing their health concerns about smoking a full flavor Viceroy." FTC report at 18 (quoting Viceroy strategy paper dated March 3, 1976). The Viceroy strategy paper also indicated that other major full flavor brands had either consciously or unconsciously "coped" with the smoking and health issues in advertising by appealing to repression. The strategy paper suggested that Viceroy's advertising objective should be to "communicate effectively that Viceroy is a satisfying flavorful cigarette which young adult smokers enjoy, by providing them a rationalization for smoking, or, a repression of the health concern they appear to need." FTC report at 19 (citing Viceroy strategy paper).

The FTC report then cited three Viceroy advertising strategies that were used in a six-month media campaign conducted in three test cities in 1976. The first campaign was the "satisfaction" campaign which was intended to provide a "rationalization." Specifically, the intention was to convey the message that "Viceroy is so satisfying that smokers can smoke fewer cigarettes and still receive the satisfaction they want." The second campaign, the "tension release" campaign, was intended to convince the smoker that Viceroy's satisfying flavor would help the smoker in a tense situation. The third campaign, the "feels good" campaign, was intended to repress concerns that smokers might have about smoking by justifying it with the simple slogan "if it feels good, do it; if it feels good, smoke it." FTC report at

20 (citing internal memorandum dated July 14, 1976). None of these campaigns was cited in the FTC report as an example of Viceroy implementing the MARC report strategy to relate the cigarette to "pot," wine, beer, and sex. The FTC report stated, however, that Brown & Williamson documents did indicate that the company had "translated the advice on how to attract young 'starters' into an advertising campaign featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a 'free and easy, hedonistic lifestyle.'" FTC report at 20 (citing document titled Viceroy Marketing/Advertising Strategy dated January 26, 1976).

After reviewing the report, Radutzky contacted members of the FTC staff who had drafted the report to confirm that the partial copy of the report he had received from the Kentucky newspaper was accurate. The staff members told Radutzky that they could not send him the confidential documents cited in the report but did confirm that the report and its findings were accurate.

Radutzky also spoke on at least two occasions with Brown & Williamson public relations officer Thomas Humber. At trial, CBS introduced two internal Viceroy documents, which were written by Humber for his superiors, that relate the substance of the conversations that Humber had with Radutzky. In a conversation on November 4, 1981, Humber stated that the internal Viceroy memoranda could only be understood in context. The context included the fact that the Ted Bates agency was told prior to their submission of the memo that it was in trouble on the Viceroy account because Brown & Williamson was unhappy with its work. Humber told Radutzky that Brown & Williamson had not requested any ad campaign similar to the one suggested by Bates. Moreover, he stated that Brown & Williamson had rejected the strategy embodied in the documents submitted

by Bates. Humber also noted that "thus far [we] have been unable to find copies of the proposed ads, to the best of our knowledge, no ads as described by the memo were ever actually published." Radutzky was also informed that partly as a result of Brown & Williamson's dissatisfaction with the specific proposal submitted by Bates, Brown & Williamson had terminated Bates' participation in Viceroy advertising. In a conversation with Radutzky on November 5, Humber told Radutzky that all Brown & Williamson ads must have the approval of the legal department and the highest levels of senior management. He also stated that the legal department did not get involved in the creative process and did not review the ads until they "are at the point of worked-up ads." Humber stated that the proposals referred to in the FTC report were similar to a proposed libelous story that a young inexperienced reporter might submit to his editors but that was corrected by a news organization's editors and attorneys. Humber stated that in such a case no legitimate criticism could be leveled at the news organization. He clearly implied that because Brown & Williamson had never run any of the controversial proposals as ads, it would be unfair to criticize Brown & Williamson simply because such proposals had been made by individuals who could not authorize an ad campaign.

In addition to contacting Brown & Williamson, Radutzky, on Jacobson's request, conducted a search for "pot," wine, beer and sex ads that were used by Viceroy. Unable to locate any such ads, Radutzky reported the result of his search to Jacobson. Radutzky also commented to Jacobson prior to the broadcast that Jacobson's script for the broadcast omitted Brown & Williamson's statement that it had never adopted a "pot," wine, beer or sex strategy. Jacobson did not alter his script.

During the course of this investigation, Radutzky made contemporaneous interview notes and extensive handwritten notes on his copy of the FTC report. In addi-

tion, he developed an eighteen-page sample script for the broadcast. The sample script, which was duplicated at least six times and distributed to various people in the newsroom including Walter Jacobson, reported "both sides of the issue." The jury never saw much of Radutszy's work product. Prior to trial, Radutzky destroyed all of his contemporaneous interview notes, five of the ten pages of the FTC report including those pages that contained the recommendations from the MARC report, and fifteen of the original eighteen pages of his sample script. CBS was unable to produce any of the copies of the sample script that Radutzky had distributed in the newsroom.

Radutzky testified that he destroyed his materials as part of a general housecleaning after the original complaint in this case had been dismissed by the district court but before he became aware that Brown & Williamson appealed that dismissal. His destruction of the documents contravened a CBS retention policy that provides that once litigation has commenced "any and all related materials should be retained until specifically released." The policy also provides that "[o]bviously if there is a . . . pending legal action, our policy is to retain all pertinent materials unless specifically released by the Law Department." Although Radutzky conceded that he did destroy the documents without the approval of the Law Department at CBS, he stated that he was unaware that the policy existed.

When Radutzky destroyed the documents, he was no longer assigned to the Perspective unit and therefore his desk was in a completely different section of the newsroom. Nonetheless, he apparently made a point of "cleaning house" in the Perspective section of the newsroom even though he had not worked there for several months.

Brown & Williamson attempted to prove that Jacobson's charges were false by introducing every Viceroy

advertisement published between 1975 and 1982. They argued to the jury that none of these advertisements was a "pot," wine, beer, or sex ad. In addition, Robert Pittman, the Brown & Williamson Vice President whose approval was required before any Viceroy ad could be published, testified that he had never seen the MARC report prior to litigation in this case. Pittman also stated that Brown & Williamson had never asked Bates to design any "pot," wine, beer, and sex ads. William Scholz, the Bates employee in charge of the Viceroy account, confirmed that Brown & Williamson had never asked Bates to utilize a "pot," wine, beer, and sex strategy in developing advertisements.

Brown & Williamson put forth evidence that it adhered vigorously to the Cigarette Advertising Code, which bars advertising to persons under 21. In addition to adhering to the Code, Brown & Williamson took the additional step of establishing a detailed procedure to ensure that its advertising agencies did not use models who either were or appeared to be younger than 25. When undertaking advertising campaigns that involved the distribution of samples, Brown & Williamson required the individuals distributing the samples to sign statements promising not to distribute cigarettes to people under 21.

Walter Jacobson also testified at trial. Jacobson indicated that he had read the FTC report prior to delivering his Perspective and was aware that the FTC report was quoting a document prepared by Market and Research Counselors. He agreed that the way in which the Perspective was delivered, with the Viceroy graphics on the screen at the time he was referring to the "pot," wine, beer, and sex strategy, would convey the impression that the "pot," wine, beer, and sex comment was made by Viceroy itself rather than MARC. After agreeing that such an impression would be created, Jacobson added that "I even said that, 'Viceroy says.' "

Jacobson's testimony indicated that he had reviewed Radutzky's sample script prior to delivering the Perspective. Jacobson corroborated part of Radutzky's testimony by confirming that Radutzky had told him that he had been unable to find any ads showing that Brown & Williamson had implemented a "pot," wine, beer, and sex advertising strategy. Jacobson was also aware that Radutzky had spoken with Brown & Williamson and that the company denied adopting the strategy and therefore had no advertisements that they could supply that would reflect that strategy. According to Jacobson, he paraphrased Viceroy's denial in the broadcast when he stated "Viceroy insists . . . whose fault is it that children are smoking? It's not ours."

Jacobson also agreed, at least at one point, that it would be fair to say that when he wrote the Perspective script he wrote it in the present tense with respect to Viceroy and the purported "pot," wine, beer, and sex strategy. For example, he agreed that when he used a phrase such as "[t]hat's what Viceroy is saying," he realized that it would be interpreted by any reasonable listener as referring to the present tense. At other points during his testimony, however, Jacobson appeared to state that some language used during the broadcast was past tense. While recognizing that there was no indication in the Perspective that the strategy mentioned in the MARC report had been recommended in 1975, six years before the broadcast, Jacobson testified that because the FTC report described it as "the Viceroy strategy" he did not believe that he gave the viewer "an impression of time that varies from the facts." Under further questioning, Jacobson did agree that the phrase "[a]n attempt should be made, says the Viceroy slicksters to relate the cigarette to 'pot,' wine, and beer" would be "more current" than the phrase "the Viceroy strategy." [2]

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[2] Jacobson also agreed that when he said "Viceroy slicksters" he was talking about Brown & Williamson and the people who make Viceroy cigarettes as opposed to their advertising agency.

Jacobson also noted that there was a distinction between a report, an analysis, a commentary and an editorial. An example of a report, according to Jacobson, would be if a newsperson went on the air and said "[t]he FTC says that Viceroy did such and such, and Viceroy says it did not." He agreed that when delivering such a statement a reporter should try to be fair and accurate. Jacobson also stated that "[m]y life is research" and indicated that what he said in the Perspective was "absolutely true."

On direct examination, Jacobson's counsel brought out his client's state of mind at the time of the broadcast. Jacobson asserted that he "believed" at the time he delivered the Perspective that it was truthful and that it was a fair and accurate summary of what the Federal Trade Commission had said about Viceroy cigarettes. Jacobson also testified about what he "intend[ed]" to inform the viewers about Viceroy when he "sat down to write" the Perspective. When cross examined, Jacobson confirmed that he had testified on direct examination about what he was thinking when he wrote the script and attempted to refute the allegation that he "really [had] no recollection at all of what [he] thought about in" preparing the script by stating that such an assertion was "absolutely untrue." Brown & Williamson's counsel then read Jacobson's 1984 deposition in which the following exchange took place:

> Question: I just want to know if you have a recollection whether in 1981, when you called the manufacturers of Viceroy cigarettes liars, you were attempting then to be objective?
>
> Jacobson: I don't remember what I was thinking now when I wrote that three and a half years ago.
>
> Question: Can you recall whether when you wrote the November 11, 1981 script, you were trying to fairly present both sides of the question?

Jacobson: I don't remember what I was thinking when I wrote that script. It's hard to remember three and a half years ago.

Question: You don't remember what was in your mind?

Jacobson: Right.

Question: You do remember you wrote the script though?

Jacobson: I don't remember writing it. I do see it.

Question: You don't remember writing it?

Jacobson: Yes, I mean—I don't remember sitting at my typewriter, what I was thinking and how my hands were working. I see the script. It has a date. I wrote it, obviously, and I remember being involved in a series of reports on that subject.

On redirect examination, Jacobson asserted that his recollection of his state of mind at the time of the broadcast had improved from the time of his deposition to the time of the trial because he had "gone over everything that ha[d] been given [him] by a whole team of lawyers" including the script that he used during his Perspective and the videotape of the actual broadcast. Jacobson stated that as a consequence his memory was jarred and he was able to "just recall more specifically some things that I didn't recall from before."

II.

Concerned that traditional state law actions for defamation might interfere with the First Amendment guarantees of free expression, the Supreme Court held in the landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that a public official could recover in a libel action only if the official was able to show that the alleged defamatory statement was made with " 'actual malice'—that is with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. This constitutional standard, which was ex-

tended to public figures such as Brown & Williamson in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), requires that the plaintiff prove by "clear and convincing evidence" that the defendant either knew the statement was false or "in fact entertained serious doubts as to [its] truth . . . ." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

In *New York Times*, the Supreme Court also outlined the role that a reviewing court must play in insuring that the First Amendment is not infringed upon. In reviewing a defamation verdict, courts must exercise particularly careful review. They "must 'make an independent examination of the whole record,' . . . so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)); *see also Tavoulareas v. Piro*, No. 83-1605, slip op. at 24-27 (D.C. Cir. Mar. 13, 1987) (en banc). In *Bose v. Consumers Union*, 466 U.S. 485 (1984), the Court reaffirmed the *New York Times* mandate of independent appellate review that it had applied "uncounted times before." *Id.* at 514. The Court stated that "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question of the trier of fact." *Id.* at 511. The Court held that appellate judges "must exercise independent judgment and determine whether the record establishes actual malice with convicing clarity." *Id.* Jacobson and CBS argue that *Bose* mandates independent appellate review of all issues of "constitutional fact," *see Bose*, 466 U.S. at 508, n.27, which they contend includes the issues of falsity and opinion. Brown & Williamson counters that *Bose* allows expanded appellate review "solely of the issue of actual malice, and of no other question." Appellee's Brief at 7 (citing *Bose*, 466 U.S. at 514 n.31). There is also a dis-

pute about what independent appellate review means. The District of Columbia Circuit in *Tavoulareas v. Piro*, slip op. (D.C. Cir. 1987), recently summarized the two positions. "Under one view, *Bose*'s mandate of *de novo* review means precisely that, with no deference at all to be accorded any jury finding germane to actual malice. Under the contrary view, *Bose* does not alter the traditional rules governing the review of jury verdicts and thus judicial deference is constitutionally mandated to presumed jury findings of underlying facts, evaluations of credibility, and the drawing of inferences." Slip op. at 24-25.

The extent to which *Bose* mandates independent appellate review "as to findings of underlying facts, evaluations of credibility, and the drawing of inferences" is still an open question. *See Tavoulareas*, slip op. at 25 (declining to decide the issue). *But see Tavoulareas*, slip op. at 4 (Wald, C.J., concurring in judgment) (arguing that *Tavoulareas* majority does "reexamine and reject 'permissible' inferences which the jury might have drawn to support their verdict"). We decline to "tackle the knotty constitutional issue regarding what constitutes independent review under *Bose* . . . " *Tavoulareas*, slip op. at 26. We also decline to decide whether Brown & Williamson is correct in arguing that *Bose*'s mandate of independent appellate review encompasses only the issue of actual malice.

We can avoid these issues by accepting, for purposes of this case only, the defendants' argument that *Bose* mandates a wide-ranging appellate review, with little or no deference to the jury's findings, of all aspects of this case including falsity and opinion. We emphasize that we are not deciding the correctness of the defendants' interpretation of *Bose*. Rather, we are applying their interpretation because we can avoid the difficult issues left unresolved by *Bose* without affecting the outcome of this case because both deferential and *de novo* review yield the same result.

Of course, even under defendants' interpretation of *Bose*, there is a limit to the amount of independent review that an appellate court can engage in. For example, we are incapable of making complete credibility determinations because we are unable to observe the demeanor of witnesses. We can, however, review the transcript of a witness's testimony and determine whether the record would give us any reason to question the jury's credibility findings. When the record fully supports the jury's determinations, as in this case, *Bose* obviously requires the appellate court to affirm the decision below. In short, we do not believe, nor do defendants argue, that *Bose* requires an appellate court to believe the unbelievable and to accept the untenable. At most, *Bose* requires an appellate court to review all the findings below, to the extent that it can within the confines of an appellate record, and determine whether the judgment below is correct. In our discussion, we will undertake a thorough review of all aspects of this case including opinion, falsity, fair summary, and actual malice and determine whether the evidence supports the jury verdict.

III.

CBS and Jacobson raise three main liability defenses. First, they contend that the broadcast was an expression of editorial opinion protected by the First Amendment. Second, they argue that the statements of fact that were in the broadcast, including the summary of the FTC report, were substantially true. Finally, they assert that Brown & Williamson did not meet its burden of proving actual malice.

A. *Opinion*

Both parties ask us to apply a test used by the District of Columbia Circuit, *see Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (plurality opinion of Starr, J.), *cert. denied*, 471 U.S. 1127 (1985), in deciding

whether Jacobson's Perspective was opinion protected from a defamation suit by the First Amendment.[3] Under the test, a court must first analyze whether the statement has "a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous." 750 F.2d at 979. Second, a court must consider whether the statement is capable of being objectively characterized as true or false. Third, a court should review the full context of the statement because the language surrounding an alleged defamatory statement may influence "the average reader's readiness to infer that a particular statement has factual content." *Id.* Fourth, in addition to considering the immediate context in which a statement is made, a court should also consider the broader social context into which the statement fits. *Id.* at 983.

In support of their argument that the literary and social context in which the Perspective was made requires this court to conclude that the Perspective was opinion protected by the First Amendment, defendants note that Jacobson delivered his Perspective away from the anchor desk with the word "Perspective" written on the screen near Jacobson's signature. They also argue that because the Perspective was delivered in a vehement and caustic manner and the phrase "the killer business" was used near the beginning of the Perspective, viewers should have been alerted to Jacobson's harsh opinion of the techniques of cigarette advertisers. They cite as an example Jacobson's statement that the cigarette "slicksters . . . are not slicksters, they're liars." In addition, defendants argue that the use of phrases such as "slicksters,"

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[3] Although we are using the test embodied in Judge Starr's opinion, we do so only at the request of the parties. Because the parties agree on the *Ollman* test, we need not decide whether that test is the appropriate one to assist a court in differentiating fact from opinion. *See generally McCabe v. Rattiner*, 814 F.2d 839 (1st Cir. 1987).

"the killer business," "hook 'em while they're young," "addicting the children to poison," and "they're liars," show that the broadcast when considered in context is really protected opinion. CBS's opinion argument appears to be best summarized by their contention that "[t]he tone of the broadcast should have immunized CBS and Mr. Jacobson from liability—not exposed them to it." Appellant's Brief at 34.

In making its "context is determinative" argument, CBS ignores some important facts. First, Jacobson's co-anchor began his introduction for the Perspective by stating that "Walter has been *reporting* [for the past two nights] on the companies that make cigarettes and the clout they carry in Washington." (Emphasis added.) In completing the introduction, Jacobson's co-anchor stated that "[t]onight he has the last in his series of special reports, a look at how the cigarette business gets its customers." The Perspective was also promoted during the day of the broadcast as "[t]obacco industry hooks children . . . Tonight at 10:00." The introduction itself and the promotional advertisements would appear to lead reasonable viewers to believe that what they were about to hear was a news report by Walter Jacobson. In addition, the literary context in which the statement was made also provides no assistance to CBS. CBS concedes, as it must, that the entire Perspective was filled with specific examples of cigarette marketing techniques that would attract young people. Rather than preparing the viewer for Jacobson's opinion about Viceroy, the literary context prepared the viewer for an example of how Viceroy went about attracting young smokers. An example (whether true or not) is exactly what Jacobson provided.

The defendants appear to realize that the literary and social context does not automatically immunize the entire broadcast as opinion because they concede that "not . . . every statement in the broadcast is automatically immune from factual analysis." Appellant's Brief at 37 n.14. De-

spite this concession, the defendants have failed, with one minor exception, to argue to this court what specific statements constitute protected opinion.[4] The defendants probably prefer to avoid specifics because even a cursory analysis of the relevant parts of the broadcast using the first two factors in the *Ollman* analysis ("core meaning" and the extent to which a statement can be characterized as true or false) reveals that the statements are factual. "The cigarette business insists . . . it is not selling cigarettes to children. . . . That's what Viceroy is saying. Who knows whose fault it is [that children are smoking more]? It's not ours." There is an obvious "core meaning," *see Ollman*, 750 F.2d at 979, to this statement (Viceroy says it is not selling cigarettes to children) that is either true or false. It is not an indefinite or ambiguous statement. *Id.* Jacobson also says that "[w]ell, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising [sic]. The Viceroy strategy for attracting young people (starters, they are called) to smoking." The Perspective then states what the "Viceroy strategy says" and what "the Viceroy slicksters say." The critical passages of the Perspective are without question factual under the first two *Ollman* factors. The only issue is whether the quoted statement is true or false.

We note that in holding that the broadcast is fact and not opinion, we simply agree with the view that Jacobson expressed at trial. Jacobson, in attempting to draw a distinction between a report, an analysis, a commentary, and an editorial, stated that a report would be if a reporter went on the air and said "[t]he FTC says that Viceroy did such and such, and Viceroy says it did not."

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[4] The only relevant part of the broadcast that the defendants contend is opinion is Jacobson's closing statement that "they're liars." As Brown & Williamson points out, even assuming that "they're liars" can be characterized as opinion, it does not make the various other allegations against Brown & Williamson any less factual.

Jacobson's example of a report is, of course, essentially what he delivered to his viewers on November 11, 1981. The fact that a report is delivered in a caustic tone does not turn a statement of fact into a statement of opinion.

Our holding on this issue is also supported by the statements of Jacobson's trial counsel. In closing argument, it was asserted that the statements Jacobson made (as interpreted by Jacobson and CBS) were "absolutely, totally, 100% true." While an opinion can be right or wrong, it cannot be true or false. Jacobson's trial counsel recognized this and so do we.

B. *Falsity*

In their closing argument at trial, CBS argued at three separate points that "when you look at the Perspective closely you will see that there is no statement whatsoever about any advertising being run, and the suggestion made [by Brown & Williamson] that advertising is being run . . . is only an attempt to take your eye off the ball of what the real issue in this case is." CBS also stated that Jacobson "never in his Perspective said anything about running pot, wine, beer and sex advertisements." It reiterated this point later in its closing argument: "[a]gain, I ask you: Is there a word? Is there a single word that says that Viceroy ever ran an ad featuring pot, wine, sex and beer?" The defendants answered the question themselves: "Of course there is no such statement. And it's ridiculous to suggest that they ever did run such a campaign."

It may be ridiculous to suggest that such a campaign was run but this is exactly what CBS now argues before this court. We reject CBS's argument not only because CBS waived it but also because it is not convincing. CBS contends that three advertisements, which were run as part of a six month test market campaign in three cities, were the implementation of the "pot," wine, beer and sex strategy recommended in the MARC report. These adver-

tisements, according to CBS, were the "more refined and acceptable expression of the MARC strategy" to present the cigarette as part of the illicit pleasure category of products and activities. Responsive Brief at 2. The ads, as described by CBS, show "a well-dressed young woman wading in a public fountain while her date looks on, a young man poised to throw a cream pie at the camera, and a young woman dousing her head under a water pump." At the top of the ads is the slogan "If it feels good, do it. If it feels good, smoke it." According to CBS, the first sentence is "a common slogan of the sexual revolution" while the second sentence is "a thinly-veiled reference to marijuana." At the bottom of each advertisement is a picture of a package of Viceroy cigarettes Under the package is the slogan "Viceroy. It feels good."

We agree with trial counsel that these ads cannot be fairly characterized as "refined" versions of "pot," wine, beer, and sex ads. In the fountain ad, the woman is fully clothed in a dress and a shirt jacket. The water in the fountain is coming up to her knees and her dress appears to be about five inches above her knee on the right leg and eleven inches above the knee on her left leg, which is extended forward. The man in the ad is fully clothed and about ten feet away from the woman. She appears from the picture to be having a good time even though she is not involved in any sexual adventure. The ad seems to imply that this is a woman who has done something (wade in the fountain) because "it feels good." The ad also implies that this woman, who is holding a cigarette in her hand, is smoking that cigarette because it feels good. ("If it feels good, smoke it.") The connection to Viceroy is at the bottom of the ad where it states "Viceroy. It feels good." As we read the ad in context, the full message is that an individual should do things that feel good and that because Viceroy (not marijuana) feels good when one smokes it, the American consumer should choose Viceroy. The other two ads convey essentially the

same message. The age range of the models in the advertisements appears to be from the mid to late twenties to the mid thirties. We conclude that these ads are not, even in somewhat refined form, "pot," wine, beer, and sex ads.

It is true that the phrase "if it feels good, do it" can under certain circumstances have sexual connotations. When the ads are read in context, however, there is only an attempt to relate pleasurable experiences (which could include sex but in the ads do not) to smoking Viceroys. Our reading of these ads is also supported by the FTC report which cited these ads as an attempt by Brown & Williamson to implement a strategy that attempted to provide consumers "with a rationale for smoking a full flavor Viceroy . . . ." These ads were not cited by the FTC as an attempt by Viceroy to attract "starters" or to implement the "pot," wine, beer, and sex strategy that had been proposed by MARC. Moreover, even if these ads could be characterized as sex ads, CBS has failed to show the truthfulness of the "pot," wine, and beer allegation. [9]

In a related challenge, CBS argues that the district court erred in excluding a document referred to at trial as the final MARC report. The final MARC report was submitted by MARC to Bates in May 1976. The final MARC report is not the May 1975 "pot," wine, beer, and sex MARC report authored by N. Kennan. The final MARC report, which was not referred to in the FTC report, is a 243 page document that gives the details of testing of several "comp" ads, which are artists' renderings of possible advertising approaches. Two primary reasons support the district court's decision not to allow the final MARC report to be published to the jury. First, there was no showing that the content of the final report could be fairly attributed to Brown & Williamson since it had been written by MARC. Therefore, some of the contents of the report which the defendants argue contain some sexual themes might be unfairly attributed by

the jury to Brown & Williamson rather than MARC. Second, although there were similarities between some of the composite ads and the test market campaign actually run by Viceroy, the published ads themselves, and not the composite ads, were the only probative and nonprejudicial material that could be fairly attributed to Brown & Williamson.

CBS argues in this court that by excluding the final MARC report, the district court excluded "*the* critical evidence" of truth. The defendants contend that by seeing the final report, the jury would have understood that Brown & Williamson did implement the "pot," wine, beer, and sex strategy in an advertising campaign. The defendants point to the fountain ad as an example. In the final report, there was an ad similar to the fountain ad described above but with the slogan "If you don't have a hangup about pleasure." In addition to changing the slogan before the ad was test marketed, Brown & Williamson also changed the ad, according to the defendants, "slightly to diminish its more overt sexual connotations." If the ads were truly similar to the ones used in the campaign, the defendants should have argued to the jury that the published ads, which were admitted into evidence, were indeed "pot," wine, beer, and sex ads. The defendants would not have needed the composite ads to make this argument. Of course, CBS and Jacobson declined to make such an argument apparently because they believed, as do we, that such an argument would have failed. Moreover, as the FTC report made clear, the fountain ad was not used to implement the "pot," wine, beer, and sex strategy for "starters" but was used to provide all consumers a rationale for smoking a full-flavor Viceroy. We conclude that the district court did not abuse its discretion in excluding the final MARC report.[5]

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[5] The defendants also challenge Judge Hart's decision to exclude evidence of Brown & Williamson's advertising efforts for the other brands of cigarettes that it markets. Judge Hart also limited

CBS and Jacobson also argue that the Perspective was a fair summary of the FTC report. In *Brown & Williamson v. Jacobson*, 713 F.2d 262 (7th Cir. 1983) (*Brown & Williamson I*), we had to decide whether the fairness of Jacobson's summary of the FTC report "emerges so incontrovertibly from a comparison of the [FTC report] with the broadcast that no rational jury" could conclude that Jacobson had distorted the report. *Id.* at 271 (holding that under Illinois law fair summary was a question of fact for the jury to decide). We remanded the case for trial, holding that a rational jury could find that Jacobson's broadcast was not a fair summary of the FTC report. In remanding for trial, we stated that the FTC report could be interpreted to convey the "following message: six years ago a market-research firm submitted to Brown & Williamson a set of rather lurid proposals for enticing young people to smoke cigarettes and Brown & Williamson adopted many of its ideas (though not necessarily the specific proposals quoted in the report) in an advertising campaign aimed at young smokers which it conducted the following year." *Id.* We held that a jury could find that Jacobson's Perspective carried a greater sting, and therefore was not a fair summary, if it concluded that Jacobson conveyed "the following message: Brown & Williamson currently is advertising cigarettes in a manner designed to entice children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures of youth." *Id.* In answer to a special interrogatory, the jury found that Jacobson's broadcast was not a fair summary of the FTC report.

The jury's finding normally would be the end of the matter. However, subsequent to our decision in *Brown & Williamson I*, the Supreme Court decided *Bose*. Be-

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Brown & Williamson to introducing evidence directly concerning practices that applied to Viceroy. This was a reasonable limitation in a libel trial that dealt with charges that were made specifically against the Viceroy brand. Judge Hart acted well within his discretion.

cause we have accepted for purposes of this case (and only this case) the defendants' contention that *Bose* mandates appellate review with no deference to the jury's findings, we will independently review the fair summary issue. The defendants contend that our conclusion on the fair summary issue should differ from *Brown & Williamson I* because trial testimony supports their position on the fair summary issue. We do not agree. The trial record simply reinforces the result we hinted at in *Brown & Williamson I*. At trial, Jacobson stated that the Perspective attributed the "pot," wine, beer, and sex language to Viceroy rather than to the MARC report—"I even said that, 'Viceroy says.'" Jacobson also agreed that the language in the broadcast would lead viewers to believe that Jacobson was "making a present tense statement about current Viceroy strategy." These concessions simply reinforce the conclusion we hinted at in *Brown & Williamson I* and the one that Judge Hart reached in his opinion. Judge Hart correctly pointed out that "there are several differences between the FTC report and the broadcast that would allow a jury to find that the one was not a fair summary of the other." Judge Hart gave four examples:

> 1. The broadcast used the present tense to represent that the tactics were currently being used while the FTC staff report indicated that the quoted language came from a report written six years earlier.
>
> 2. The broadcast implied that the quotations from the MARC report come directly from [Brown & Williamson] while the FTC staff report clearly indicated that they were from the MARC report . . .
>
> 3. The broadcast used the term "children" to refer to the object of this strategy, while the report used the terms "young smokers" and "starters."
>
> 4. The report did not cite any published Viceroy advertisement that implemented a pot, wine, beer or

> sex strategy to attract children to smoke cigarettes. The broadcast clearly implied such ads existed.

644 F. Supp. at 1253-54. We agree with Judge Hart's observations. The defendants have given us no reason to disagree with the jury's conclusion that the Perspective was not a fair summary of the FTC report. *See also Brown & Williamson I*, 713 F.2d at 271.[6]

C. *Malice*

Even according no deference to the jury's findings, we conclude that Brown & Williamson proved by clear and convincing evidence that the defendants either knew the Perspective was false or in fact entertained serious doubts as to its truth. *See St. Amant v. Thompson*, 390 U.S. at 731; *see also New York Times v. Sullivan*, 376 U.S. at 279-80.

The most compelling evidence of actual malice submitted to the jury was the intentional destruction of critical documents by Jacobson's researcher, Michael Radutzky. The story that emerges from Radutzky's testimony is that at some point after this litigation commenced in early 1982, he destroyed various documents that in all likelihood would have established that both he and Jacobson were aware that the "tobacco industry hooks children" Perspective was false at the time that it was delivered. The documents that Radutzky destroyed included: an eighteen-page sample script which was distributed to Jacobson and others in the newsroom, Ra-

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[6] Defendants also claim that this case is controlled by the Illinois rule of innocent construction. *See Fried v. Jacobson*, 99 Ill. 2d 24, 457 N.E.2d 392 (1983); *Chapski v. Copley Press*, 92 Ill. 2d 344, 442 N.E.2d 195 (1982). Under that rule, if the defendants are able to show that the alleged defamatory statements are capable of a reasonable construction that is "innocent," then the defendant will not be liable for defamation. The rule does not apply to this case, however, because defendants have not submitted to this court any reasonable construction of Jacobson's Perspective that is "innocent."

dutzky's annotated copy of the FTC report, and various contemporaneous interview notes that Radutzky had taken while investigating the Perspective. Radutzky, however, did not destroy all of these documents. Radutzky only destroyed the parts of the documents that would have been relevant to this litigation. Radutzky destroyed fifteen of the eighteen pages of his copy of the sample script. Although there is no evidence that Radutzky destroyed the additional six or seven copies of the sample script that had been distributed to various individuals in the newsroom, CBS was unable to produce any of the copies of the sample script. Radutzky testified that he also went to Jacobson's desk (when he was no longer a member of the Perspective work unit) and disposed of some documents from Jacobson's desk that might have included the sample script. Radutzky also destroyed five of the ten pages from his copy of the FTC report. As "luck" would have it, the five destroyed pages were the pages that contained the quotations of the "pot," wine, beer, and sex recommendations from the MARC report.

Radutzky's sample script, which Radutzky admitted reported both sides of the story, was reviewed by Jacobson before he prepared the final draft of the Perspective. Radutzky's selective destruction of this document, along with all the other document destruction that he undertook, is strong evidence of actual malice. A court and a jury are entitled to presume that documents destroyed in bad faith while litigation is pending would be unfavorable to the party that has destroyed the documents. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985); *S.C. Johnson & Son v. Louisville & Nashville Railroad*, 695 F.2d 253, 258-59 (7th Cir. 1982); *see also Nation-Wide Check v. Forest Hills Distributors*, 692 F.2d 214, 217-19 (1st Cir. 1982).

Because Radutzky did have an "innocent" explanation for his activities, we must also consider whether the evi-

dence indicates that Radutzky destroyed the documents in bad faith. We conclude that even a cursory review of his story reveals that the jury was justified in finding that it was a complete fabrication. Radutzky told the jury that he destroyed the documents while he was cleaning out his section of the newsroom. Radutzky also told the jury that he cleaned up Jacobson's desk in the Perspective section of the newsroom where Radutzky was no longer assigned. Radutzky testified that he decided to do the housecleaning after he heard that the libel case had been dismissed by the district court but before he heard that the dismissal would be appealed. As the district court pointed out, his emphasis on destroying the documents after the case had been dismissed confirms that Radutzky was aware of the common-sense notion that important documents should not be destroyed while litigation is pending.[7]

For several reasons, Radutzky's story is not believable. First, Radutzky's explanation that he was unaware that Brown & Williamson had a right to appeal the initial dismissal is implausible. We do not think it immodest of us to suggest that many people know that an appellate court such as the Seventh Circuit exists. Radutzky, a college graduate who majored in history, worked "constantly" on stories involving legal matters. For a person of his experience, it is completely implausible that he would be unaware that a party who lost in a lower court had a right to challenge the decision in an appellate court. Moreover, Radutzky testified that he had "heard of an appellate process" which is all the knowledge that Radutzky needed to know to omit the documents from his housecleaning operation.

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[7] Radutzky apparently had some trouble verbalizing his thoughts at trial because at one point he stated that "I just know that I had disposed of [the documents] after I learned that the case had been appealed." After plaintiff's counsel had the statement read back, Radutzky tesified that he, of course, had meant dismissed.

A second factor undercuts Radutzky's "innocent" explanation. Although he was supposedly engaged in a general housecleaning operation, he threw out only part of the FTC report and part of the sample script. Radutzky had no explanation for why he destroyed only certain parts of the documents. The unexplained selective destruction would have allowed (almost compelled) the jury to reach two conclusions. First, Radutzky's "housecleaning" explanation was a complete fabrication. Nobody cleans house as selectively as Radutzky did. Second, because Radutzky destroyed only the parts of the documents that would have contained statements and notations relevant to this litigation, the full documents, if they had been produced, would have severely damaged CBS's case.

In addition, Radutzky had no explanation for why he would be cleaning off Jacobson's desk in addition to his own. Under normal circumstances, it would be difficult to believe that a research assistant would clean off his boss's desk without permission. In this case, Radutzky's story suffers from an additional defect because at the time that he removed documents from Jacobson's desk, he was no longer working for Jacobson and, in fact, no longer worked in the Perspective section of the newsroom. Radutzky had gone on to become the producer of the 5:00 p.m. news.

In destroying the documents, Radutzky also violated a CBS retention policy that provided:

> Once the station is notified of a claim pertaining to any of the following material, the litigation section of the Law Department should be notified and any and all related materials should be retained until specifically released.
>
> Some materials are retained indefinitely on a selected basis. Our policy is to review the files in January to determine what should be selectively retained. Obviously if there is a . . . pending legal action, our

> policy is to retain all pertinent materials unless specifically released by the Law Department.

Radutzky admitted that he was not given permission by CBS's attorneys to destroy any documents but claimed that he was unaware that CBS had a retention policy.

The defendants ask us in exercising independent appellate review to credit Radutzky's testimony. Our review indicates, however, that the evidence overwhelmingly supports an inference that Radutzky destroyed the documents in bad faith. In order for the jury to have credited Radutzky's testimony that the document destruction was not an attempt to conceal evidence of actual malice, it would have had to believe the following: (1) Radutzky was unaware that a party can appeal an adverse judgment of a trial court; (2) Radutzky decided to clean house by disposing of only certain parts of some documents; (3) Radutzky believed that it was his duty to clean off the desk of his former boss; (4) Radutzky did not adhere to the CBS retention policy because he was unaware that it existed. We conclude that the evidence fully supports the jury's decision not to believe Radutzky's "innocent" explanation. Because Radutzky destroyed the documents in bad faith, the jury was allowed to infer that the destroyed documents would have seriously damaged the defendants' case. *See, e.g., Nation-Wide Check*, 692 F.2d at 217-19. The destruction of the documents is strong evidence of actual malice.

Brown & Williamson also points to Walter Jacobson's testimony as evidence of actual malice. Jacobson's testimony revealed that he had received and reviewed Radutzky's sample script prior to delivering the broadcast. In addition, he knew that Radutzky's search for "pot," wine, beer, and sex ads had been unsuccessful. Jacobson had also read the FTC report and was aware that the "pot," wine, beer, and sex language in the report was not from a document prepared by Brown & Williamson but was actually from a document prepared by MARC. Nonethe-

less, his testimony indicated that he had intended to create the impression that the "pot," wine, beer, and sex comment had been made by Viceroy itself. ("I even said that, 'Viceroy says.'") His assertion that he intended to create the impression that the "pot," wine, beer, and sex statement was made by Viceroy indicates that Jacobson acted with actual malice since he admitted that he knew that the statement was made by MARC rather than Viceroy.[8]

Defendants cite other Jacobson testimony in support of their argument that Jacobson only inadvertently created the impression that Viceroy was running "pot," wine, beer, and sex ads. Specifically, they contend that the following exchange during Jacobson's direct examination supports their argument:

> Question: When you sat down to write this Perspective, and then when you got on the air and delivered it, did you intend to inform your viewers that Viceroy was actually running advertising that contained pot, wine, beer and sex?
>
> 'Jacobson: No, no way. I didn't say it. I didn't think it. I was reporting on the federal government report. And I put the quotes on the air. And I was not making a statement whatever about advertisements, certain advertisements that might have been implemented. I was simply saying what the report said, that this was a Viceroy strategy, that this strategy might have been there for ten years, twenty years, two years, or whatever.

Defendants ask us to credit this testimony and conclude that because Jacobson did not intend to create a false impression about Viceroy advertising, he did not act with actual malice. Brown & Williamson counters that the

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[8] As discussed in more detail below, even if we were to disregard Jacobson's admission on this point, the other evidence supports the jury's verdict on actual malice.

language and graphics used in the broadcast itself indicate that Jacobson could not have delivered the broadcast without intending to inform viewers that he was talking about current Viceroy advertising. The district court, in its thorough opinion, dealt with these arguments this way:

> [T]he jury could have rejected Jacobson's testimony that he did not intend to communicate a message about actual Viceroy advertising. The theme of the broadcast was cigarette advertising. The statements made in the broadcast relating to the "Viceroy strategy" were made in the context of explaining why so many children take up smoking. The statement was made by Jacobson that television advertising of cigarettes is off limits; so the "killer business has gone to Madison Avenue with a billion dollars a year for bigger and better ways to sell cigarettes." Just prior to describing "the Viceroy strategy," Jacobson stated in the broadcast:
>
> > The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children, that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. "Who knows whose fault it is?" says the cigarette business. "Who knows whose fault it is that children are smoking? It's not ours."
>
> Jacobson immediately goes on to describe "a Viceroy *advertising*, the Viceroy strategy for attracting young people, starters they are called, to smoking." The reference to "Viceroy advertising" and "the Viceroy strategy" at that point can be understood as demonstrating how and why children begin smoking, and that it was Viceroy's fault (at least as one advertiser).

A "strategy" that was not implemented, that was nothing more than a report in a drawer, could not

> explain why children smoke. Only advertising that children see can persuade them of anything . . . . Jacobson [at the end of the Perspective] stated that the cigarette companies were liars because they were in fact selling cigarettes to children. And the clear message is that Viceroy was doing this through the use of its advertising that relates the cigarette to pot, wine, beer, and sex.

644 F. Supp. at 1250. Judge Hart continued:

> [T]he statement made by Jacobson is a powerful statement indicting the cigarette industry and Viceroy in particular. It communicates the message that Viceroy was using actual advertisements to hook children on cigarettes.
>
> The evidence was such that the jury could have found it incredible that Jacobson gave this impression inadvertently. Jacobson is a veteran newsman and commentator who writes hundreds of Perspective scripts each year . . . . The entire broadcast dealt with methods *actually used* by the cigarette industry to entice children to smoking, such as advertising in popular movies and distributing cigarettes on the street. The visual portion of the broadcast included pictures of cigarettes being distributed to young people on the street. Defendants admitted that this footage was taken from its archives and that Viceroy cigarettes were not being distributed . . . . [T]he evidence does not support a conclusion that Jacobson inadvertently sent the message that Brown & Williamson was actually using such ads . . . .

644 F. Supp. at 1251 (emphasis in original). We agree with Judge Hart's excellent analysis. The plain language of the broadcast undermines Jacobson's testimony that he did not intend to make a statement about Viceroy's current advertising practices. Moreover, Jacobson's deposition testimony also reveals that he did not accurately

testify about his state of mind at the time of the broadcast. At his deposition in the summer of 1984, Jacobson said that he did not remember what he was thinking when he wrote the script and did not even remember writing the script. As Jacobson himself pointed out at the deposition, "[i]t's hard to remember . . . ." We conclude that the evidence supports the jury's decision not to credit his later claim that his recollection had been refreshed.

Disregarding Jacobson's testimony (including his admission that he intended to attribute the MARC language to Viceroy), the evidence shows that Jacobson received and reviewed the FTC report. In addition, he was aware that Radutzky's search for "pot," wine, beer, and sex ads had been unsuccessful and that Brown & Williamson had denied publishing ads implementing the strategy. Defendants argue vigorously that each of these facts, standing alone, cannot provide clear and convincing proof of actual malice. Responsive Brief at 26-31 (citing *Time, Inc. v. Pape*, 401 U.S. 279, 289-92 (1971) (rational misinterpretation of government report that "bristled with ambiguities" does not create jury issue on actual malice); *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) (actual malice cannot be predicated solely on mere denials)); *see also Bose*, 466 U.S. at 511 (there is a significant difference between proof of actual malice and mere proof of falsity); *Woods v. Evansville Press*, 791 F.2d 480, 489 (7th Cir. 1986) (reporter's journalism skills are not on trial in a libel case). The cases defendants cite are unlike this one because none of them combines a distortion of a government report with a vehement denial of the "pot," wine, beer, and sex charge and an investigation by the journalist that tended to corroborate the denial. Moreover, none of those cases had evidence of document destruction. We conclude that when the intentional destruction of the sample script (which

Jacobson did review prior to delivering the broadcast) is considered along with the distortion of the FTC report, Brown & Williamson's denial, and the corroboration of the denial, Brown & Williamson has met its burden of proving that Walter Jacobson and CBS acted with actual malice.[9]

IV.

In general, damages remedies in defamation cases can include: (1) compensatory damages which may be either general or special; (2) punitive or exemplary damages; and (3) nominal damages. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 532 (10th Cir. 1987) (quoting *Prosser and Keeton on Torts* § 116A (5th ed. 1984)). Illinois adheres to the general rule. *See Babb v. Minder*, 806 F.2d 749, 757-58 (7th Cir. 1986) (discussing Illinois law); *see also Erickson v. Aetna Life & Casualty Co.*, 127 Ill. App. 3d 753, 469 N.E.2d 679 (2d Dist. 1984). In seeking compensatory damages, a plaintiff may attempt to prove "special damage, that is, of directly linking specific [economic] loss to the [defamatory material] by competent evidence." *Sunward*, 811 F.2d at 532; *see also Prosser and Keeton on Torts*, § 116A at 844. In certain actions in which the defamatory material is characterized as defamatory *per se*, the plaintiff

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[9] Brown & Williamson also argues that pressures to produce interesting stories brought on by the November "sweeps" is "strong proof of actual malice." Ratings during "sweeps" months such as November and May are especially important in determining the rates that advertisers will pay to stations to promote their products. The extent to which journalistic pressures to produce can constitute evidence of actual malice has caused some debate among members of the federal bench. *Compare Tavoulareas v. Piro*, slip op. at 66-68 *with Tavoulareas*, slip op. at 53-56 (MacKinnon, J., dissenting). Because we have concluded that there is clear and convincing evidence of actual malice without considering the "sweeps" evidence, we need not enter this debate. We do note that CBS has not objected to the district court's admission of the "sweeps" evidence.

may recover general compensatory damages without proving special damages. This is called the doctrine of presumed damages and it allows the assessment of damages "without proof by the plaintiff that there [has] been any impairment of reputation." *Prosser and Keeton on Torts*, § 116A at 843. Under that doctrine, presumed damages is "an estimate, however rough, of the probable extent of actual loss a person had suffered and would suffer in the future, even though the loss could not be identified in terms of advantageous relationships lost, either from a monetary or enjoyment-of-life standpoint." *Id.* The doctrine of presumed damages applies to this case because the libelous material prejudiced Brown & Williamson in its trade or business in a manner that is " 'so obviously and naturally hurtful to [Brown & Williamson] that proof of [its] injurious character can be, and is, dispensed with.' " *Brown & Williamson I*, 713 F.2d at 268 (quoting *Reed v. Albanese*, 78 Ill. App. 2d 53, 58, 223 N.E.2d 419, 422 (1966)). At trial, Brown & Williamson did not attempt to prove special damages but relied instead on the doctrine of presumed damages. The jury returned a verdict of $3,000,000 in compensatory damages which in this case is composed only of presumed damages. The district court reduced the compensatory damage award to $1.00. 644 F. Supp. at 1260-65. Brown & Williamson appeals that decision.

Punitive damages may also be awarded under Illinois law by a jury when a public figure such as Brown & Williamson proves that a defendant has defamed it with actual malice. *See Babb v. Minder*, 806 F.2d 749, 758 (7th Cir. 1986). The purpose of punitive damages, of course, is to punish the defendant for the improper conduct and to deter him from any future transgression. The jury awarded $2,050,000 in punitive damages against CBS and Jacobson and the district court upheld the award. 644 F. Supp. at 1260-65. In this court, CBS and Jacobson challenge the punitive damage award as both excessive and inappropriate.

A. *Compensatory Damages*

During the damage portion of the bifurcated trial, Brown & Williamson introduced a variety of evidence intended to show that its reputation had been harmed by Jacobson's statement. First, Brown & Williamson's general counsel testified that after the broadcast there were calls from the field sales force indicating that their contacts were asking "how in the world could Brown & Williamson have done such a thing." Second, a department sales manager for Brown & Williamson testified that sales managers in the Chicago area had received negative comments from distributors, retailers, and consumers. The reports he received indicated that the sales staff had been disrupted in their normal activities by questions from retailers and consumers about the broadcast. Third, the former Vice President of Marketing for Brown & Williamson testified that the company had a reputation it cared about and that he believed that Viceroy's customers care about the reputation of the company from which they buy cigarettes. He also testified that the company's reputation among governmental entities was important because the cigarettte industry is such a closely regulated industry. Fourth, the company introduced evidence that the Perspective (including its rebroadcasts) was seen by over 2.5 million people in the Chicago area. In addition, over two million people read a 1984 article in the *Saturday Evening Post* which repeated some of the most damaging portions of the Perspective. Brown & Williamson also argued that the Perspective was especially devastating because Chicago area viewers believe that Jacobson's Perspectives are reliable.

Although Brown & Williamson asked the jury for $7,000,000 dollars in compensatory damages, the jury was only willing to award $3,000,000. In setting aside the award, the district court relied primarily on the failure of Brown & Williamson to put forth any evidence that "Viceroy lost sales, lost a distributor, lost profits, or

had an employee quit or stop working as effectively and enthusiastically as he used to, or that any individual stopped smoking Viceroys." 644 F. Supp. at 1261. The court concluded that "[Brown & Williamson] clearly did not prove any actual damages . . . ." *Id.* The district court recognized that this was a case of libel *per se* and that therefore Brown & Williamson was entitled to presumed damages. *See Brown & Williamson I*, 713 F.2d at 267-69. Nonetheless, it set aside the damage award.

In addition to the failure to prove any pecuniary damages, the court cited two other reasons for its decision to reduce the damage award to $1.00. First, the court held that under Illinois law, substantial damages are not presumed. 644 F. Supp. at 1261 (citing *Bloomfield v. Retail Credit Co.*, 14 Ill. App. 3d 158, 170, 302 N.E.2d 88, 97 (1st Dist. 1973)). Second, the court found that any residual effect of the broadcast was greatly reduced if not eliminated by the jury's verdict in favor of Brown & Williamson and the accompanying publicity.[10]

The district court incorrectly relied on Brown & Williamson's failure to prove any actual damages such as lost sales. As noted above, under Illinois law, Brown & Williamson could choose, as it did, to forego any proof of special damages and seek to recover compensatory damages under the doctrine of presumed damages. *See Babb v. Minder*, 806 F.2d 749, 757-58 (7th Cir. 1986) (applying Illinois law). Brown & Williamson is entitled in this case to recover under the doctrine of presumed damages because Jacobson's Perspective was libelous *per se*. *See Brown & Williamson I*, 713 F.2d at 268-69; *see also*

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[10] The court was correct in holding that testimony that employees were emotionally upset is not relevant because a corporation is not capable of mental suffering, which ordinarily will be an important component of an individual's damage award for libel. *See Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). Although a corporation is not capable of mental suffering, it is of course still entitled to be compensated for damages to its reputation.

Brown v. Farkas, No. 85-3012, slip op. at 5 (1st Dist. Dec. 31, 1986) (presumed damages, which include injury to reputation, "arise by inference of law and are not required to be proved by evidence") (petition for rehearing pending).

It is true that the harm to Brown & Williamson's reputation cannot be measured easily. *See Brown & Williamson I*, 713 F.2d at 269. As the Tenth Circuit recently stated, "[a]scertainment of presumed general damages is difficult at best and unavoidably includes an element of speculation." *Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987).[11] Nonetheless, presumed general damages are permissible under Illinois law and under the United States Constitution. *Babb*, 806 F.2d at 758. The failure to prove specific pecuniary damages does not in any way impair the right of Brown & Williamson to recover for the libelous broadcast. In fact, an attempt to show specific pecuniary loss, while still electing the presumption of general damages, is under certain circumstances impermissible. *See Sunward*, 811 F.2d at 539. We conclude that in setting aside the damage award the district court impermissibly took into account Brown & Williamson's failure to show specific pecuniary harm.

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[11] Ascertainment of actual damages is often not much easier. This is why it "has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases . . .' W. Prosser, Law of Torts § 112 . . . As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications . . . . This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985) (plurality opinion). The reason for such a rule is illustrated by this case. Even if Brown & Williamson were able to show that there was a decline in Viceroy sales after Jacobson's Perspective, it would be extremely difficult to prove that the decline was the result of the libelous broadcast. *Cf. Sunward*, 811 F.2d at 539-41 (discussing flaws in a specific actual damage theory).

Brown & Williamson also challenges the district court's conclusion that media coverage of its victory at trial was "fair" and therefore it "ameliorates whatever injury Brown & Williamson might have . . . suffered." 644 F. Supp. at 1262. In making its finding, the court took judicial notice of the "fact" that the coverage of the liability verdict was "fair." "Fair" media coverage is not the kind of undisputed "fact" that is proper for judicial notice. *See* Fed. R. Evid. 201(b). In addition, even if the media coverage could be characterized as fair, it does not necessarily mean that the effect of the libelous statements will be ameliorated. For example, much of the post-verdict publicity reported Jacobson's vehement denials of the charges and included assurances by the defendants that, like many libel defendants, they would be victorious in the appellate court. Moreover, some of the commentary that occurred in the wake of the verdict questioned the correctness of the verdict and included some suggestions that the defendants had lost simply because they were "out-lawyered." We conclude that the district court erroneously relied on the post-verdict publicity in setting aside the damage award.

In striking the compensatory damage award, the district court also relied on a statement in an Illinois appellate court decision that substantial damages are not presumed. 644 F. Supp. 1261 (citing *Bloomfield v. Retail Credit Co.*, 14 Ill. App. 3d 158, 302 N.E.2d 88 (1st Dist. 1973)). In *Bloomfield*, the Puritan Life Insurance Company had requested a background report on Harold Bloomfield whom it was considering for a position as an insurance agent. The defendant in *Bloomfield*, the Retail Credit Company, supplied a background report to Puritan that contained defamatory material about Bloomfield. Bloomfield became aware of the defamatory report through a friend at another company who, apparently out of curiosity, had requested the report on Bloomfield. After the friend notified Bloomfield of the defamatory

material, Bloomfield contacted Retail Credit and arranged a meeting. Following the meeting and some further investigation, Retail Credit's report was amended in October 1964 to exclude most (and perhaps all) of the incorrect defamatory material. The amended report was sent to Puritan and negotiations between Bloomfield and Puritan continued until November 1964. However, no employment agreement was ever signed.

The jury in *Bloomfield* awarded $50,000 in compensatory damages and $100,000 in punitive damages. The appellate court ordered a new trial on damages because there was a great deal of improperly admitted evidence that probably prejudiced the jury. For example, although the evidence showed that the defamatory report had been sent to only one potential employer (Puritan), the plaintiff was allowed to introduce evidence that "permitted the jury to conclude that plaintiff was forever barred from further reasonable employment . . . ." 14 Ill. App. 3d at 171, 302 N.E.2d at 98. In addition, Bloomfield's counsel had suggested during his opening statement that the President of Puritan would testify that he had refused to hire Bloomfield because of the Retail Credit report. *Id.* No such evidence was introduced at trial and there was some indication in the record that Puritan's refusal to hire Bloomfield was unrelated to the Retail Credit Report. *Id.* In short, the evidence showed that there had been only one publication of the defamatory material, that it had been corrected only one month after it was issued, and that it may not have had any effect at all on Bloomfield's employability with Puritan. It was in this context that the appellate court made the statement that "*substantial* damages are not presumed." 14 Ill. App. 3d at 170, 302 N.E.2d at 97 (emphasis in original).

In *Bloomfield*, it was clear to the appellate court that $50,000 in compensatory damages was excessive. The defamatory material was published to only one potential employer and because it was corrected promptly, it had

very little effect on Bloomfield's reputation in the community. There was also a serious question whether the report had any significant impact on Bloomfield's relationship with Puritan. We conclude that *Bloomfield* provides us with very little assistance in deciding this case. It simply gives a broad guideline that substantial damages, a term whose meaning is not clear, will not be presumed.

A case decided subsequent to the district court's decision here provides us with some additional assistance in interpreting the meaning of substantial damages. In *Costello v. Capital Cities Communications*, 153 Ill. App. 3d 956, 505 N.E.2d 701 (5th Dist. 1987) (petition for review pending), the plaintiff, Jerry Costello, sued the Belleville News-Democrat which is a general circulation newspaper in St. Clair County, Illinois. Costello, who had just been elected Chairman of the County Board of St. Clair County, was attacked in a December 31, 1980, editorial as a Chairman who "blew his first chance" because he had failed at his first board meeting to "militantly oppose the implementation of any new tax without first seeking the voters' approval through a referendum." The editorial stated that this action had run directly contrary to what he had promised the newspaper when he had sought and received its endorsement. The paper accused Costello of lying and concluded its editorial with the observation "[j]ust think, we've got two more years of the Costello brand of lying leadership." The jury award Costello $450,000 in presumed damages. The appellate court agreed with the defendants' assertion that substantial damages may not be presumed, 153 Ill. App. 3d at 973, 505 N.E.2d at 712 (citing *Bloomfield*), and reduced the jury award to $200,000. The $200,000, while perhaps not "substantial" under Illinois law, certainly is a sizable figure especially when one considers that the editorial apparently had no effect on Costello's political career because he was reelected as Chairman in 1982.

We read the holding in *Costello* as advising an appellate court to give some deference to the jury's determination of presumed damages while also considering whether it considers the jury award of presumed damages excessive. If it finds the award excessive, the court may exercise its discretion and reduce the award to what it considers a more appropriate figure. One obvious factor in deciding how much deference to give a jury verdict on presumed damages is the extent to which the court believes that the jury may have been carried away by passion and prejudice. *See Douglass v. Hustler Magazine*, 769 F.2d 1128, 1143 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986). In this case, the jury appears not to have been carried away by passion and prejudice. Brown & Williamson asked for $7,000,000 in presumed damages but the jury only awarded $3,000,000. Brown & Williamson asked for $10,100,000 in punitive damages but the jury awarded only $2,050,000. At the very least, both of these awards indicate that the jury was not mere putty in the hands of the plaintiff. The strongest evidence that the jury was not carried away by passion and prejudice is its award of only $50,000 in punitive damages against Jacobson. Brown & Williamson had asked for $100,000 which in light of Jacobson's net worth of over $5,000,000 does not strike us as an especially absurd figure to seek as punitive damages. Nonetheless, the jury, despite hearing evidence of post-verdict recalcitrance (Jacobson said he would not hesitate to deliver the same broadcast again), assessed a reasonable punitive damage figure against Jacobson personally. We conclude that the jury was not carried away by passion and prejudice and that it fulfilled its duty in attempting to assess a reasonable amount of compensatory damages.

Although the jury did conscientiously fulfill its duty in this case, we are hesitant to uphold the entire award. Illinois law requires appellate courts to examine jury awards under the doctrine of presumed damages with

great care to determine whether they are "substantial" or within an acceptable range. *See Costello; Bloomfield; cf. Brown v. Farkas*, slip op. at 10 (reducing punitive damage award from $1,000,000 to $50,000). We hold that an award of $1,000,000 in compensatory damages is appropriate in this case. The $1,000,000 in presumed damages is sizable but on the facts of this case it is not "substantial" under Illinois law. We grant that it is difficult to draw a distinction but that in effect is what the *Costello* court calls for in applying the test. Unlike *Costello*, this broadcast was made not in a relatively small community but in one of the largest television markets in the country. The defamatory material here was not published once but was broadcast four separate times and was seen by a total viewership of approximately 2.5 million people. It was delivered on what was the most popular news broadcast in Chicago and was delivered by a veteran journalist who was trusted by the public and promoted by his employer as someone who "always leave you informed." Moreover, the text of the broadcast carried a very substantial sting that must have hurt both the reputation of Brown & Williamson and its parent company (which as CBS's counsel pointed out at trial owns one of the most respected department stores in Chicago). In addition, the libelous material was a television broadcast and not a newspaper editorial. Television is a more intense and more focused medium. It allows the libeler to come into peoples' homes and deliver essentially in person a powerful libelous statement using various voice inflections to add power to the message. Television also allows for the use of graphics to emphasize the libelous material. Our review of the videotape of the broadcast indicates that Walter Jacobson relied on these attributes of television using both graphics and voice inflections to further convince the viewer that Brown & Williamson was using a "pot," wine, beer, and sex strategy to attract children to Viceroy cigarettes. We agree with the district court that the message that Jacobson deliv-

ered was an extraordinarily powerful one. We also conclude that the power of Jacobson's Perspective was greatly enhanced because of the medium through which it was delivered.

We recognize that this is a very inexact and somewhat arbitrary process. Nonetheless, the process is inherent in the doctrine of presumed damages. An appellate court must, under Illinois law, use its judgment in determining the extent to which a jury award of presumed damages will be upheld. Our judgment is $1,000,000.

B. *Punitive Damages*

Punitive damages are available under Illinois law when a plaintiff has proven actual malice. *See Brown*, slip op. at 10; *see also Babb*, 806 F.2d at 758.[12] Several factors can be considered by the jury in arriving at a punitive damage award. First, and most importantly for purposes of this case, the jury was entitled to consider the amount of attorney's fees incurred by the plaintiff in bringing the libel action. *See Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill. App. 3d 703, 711, 450 N.E.2d 1199, 1206 (4th Dist. 1983); *Anvil Investment Limited Partnership v. Thornhill Condominiums*, 85 Ill. App. 3d 1108, 1121, 407 N.E.2d 645, 654 (1st Dist. 1980); *Glass v. Burkett*, 64 Ill. App. 3d 676, 683, 381 N.E.2d 821, 826 (5th Dist. 1978). Second, the jury was entitled to take into account the defendants' wealth. *See Hazelwood*, 114 Ill. App. 3d at 113, 450 N.E.2d at 1207 (punitive damages should be large enough to provide retribution and deterrence but should not be so large that the award destroys the defendant). Finally, because the purpose of punitive dam-

[12] Without citing any authority, the *Costello* court held that "where actual malice is the gist of an action for libel, as here, both compensatory and punitive damages cannot be recovered." 153 Ill. App. 3d at 976, 505 N.E.2d at 713. *Costello* stands alone among the Illinois cases and consequently we decline to follow it. *See Babb*, 806 F.2d at 758.

ages is deterrence, the jury was entitled to consider evidence of post-verdict recalcitrance in determining the punitive damage award. *See Goldwater v. Ginzburg*, 414 F.2d 324, 341 n.27 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

Taking only the first two factors into account, we conclude that the district court's decision upholding the jury's punitive damage award was clearly correct. Brown & Williamson's attorney's fees were $1,360,000 prior to post-trial motions. Jacobson's net worth including his contract with CBS was over $5,000,000, while CBS's net worth was approximately one and one-half billion dollars. The punitive damage award of $50,000 against Jacobson is a modest one considering his net worth. *See Brown*, slip op. at 10. It might provide some deterrent value without being destructive. In light of the attorney's fees that Brown & Williamson incurred and CBS's substantial net worth, the $2,000,000 award against CBS is reasonable. The award might provide some deterrence to future misconduct and yet will not burden CBS with a debt that it cannot easily discharge.[13] *See also Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) (upholding $300,000 punitive damage award).

V.

One of the most important functions of the court system in the United States is to protect the freedom of the press. *See, e.g., Bose v. Consumers Union*, 466 U.S. 485 (1984); *New York Times v. United States*, 403 U.S. 713 (1971); *New York Times v. Sullivan*, 376 U.S. 254

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[13] Defendants also argue that the punitive damage award violates the Eighth Amendment which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Even if we were to accept the defendants' argument that the excessive fines clause applies to civil proceedings, we conclude that the punitive damage award in this case is not excessive.

(1964). The federal courts of appeals including this one have played an important role in fulfilling this function. *See, e.g., Tavoulareas v. Piro*, —— F.2d —— (D.C. Cir. 1987) (en banc); *Sunward Corporation v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987); *Woods v. Evansville Press*, 791 F.2d 480, 489 (7th Cir. 1986). In considering the merits of this case, this court has granted the defendants the fullest possible review; the standard of review that we have used, giving essentially no deference to the jury's findings, may be far broader than the review to which the defendants are entitled. *See Bose*, 466 U.S. at 499-500 (constitutionally based rule of independent review permits reviewing courts to give "due regard" to the trial court's opportunity to observe the demeanor of the witnesses). After conducting such a review, it is unfortunate that we are forced to conclude that this case does not involve freedom of the press. Rather, it is one in which there is clear and convincing evidence that a local television journalist acted with actual malice when he made false statements about Brown & Williamson Tobacco Corporation. Because false statements of fact made with actual malice are not protected by the First Amendment, this court is required to affirm the district court's finding that Jacobson and CBS libeled Brown & Williamson.

AFFIRMED IN PART, REVERSED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 25, 1987

Before
HON. WILLIAM J. BAUER, Chief Judge

Nos. 86-2474
86-2475

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,
Cross-Appellee,

vs.

WALTER JACOBSON and CBS, INC.,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 1648—Judge William T. Hart

This matter comes before the court for its consideration upon the "APPELLANT'S MOTION FOR STAY OF MANDATE" filed herein on November 20, 1987.

On consideration thereof,

IT IS ORDERED that said motion is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 86-2474 and 86-2475

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellee Cross-Appellant,

v.

WALTER JACOBSON and CBS, INC.,
Defendants-Appellants Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 1648—William T. Hart, *Judge.*

ARGUED APRIL 3, 1987—DECIDED AUGUST 12, 1987
POSTJUDGMENT BRIEFS FILED
SEPTEMBER 23, 1987—DECIDED NOVEMBER 6, 1987

Before BAUER, *Chief Judge,* WOOD, and POSNER, *Circuit Judges.*

PER CURIAM. For the first time, this court must decide when to award postjudgment interest pursuant to Rule 37 of the Federal Rules of Appellate Procedure. This issue comes before us after we affirmed in part and reversed in part the district court's judgment in this libel action. *Brown & Williamson v. Jacobson,* 827 F.2d 1119 (7th Cir. 1987).

Our earlier opinion discusses in detail the facts of this case. We summarize here only the facts necessary to resolve the postjudgment interest issue. On December 5, 1985, the jury below awarded Brown & Williamson $3

million compensatory damages, $2 million punitive damages against CBS, and $50,000 punitive damages against Jacobson, for a total of $5,050,000. The district court entered judgment on the verdict the same day. Defendants moved for judgment n.o.v. or a new trial. In August 1986, the district court denied defendants' motion with respect to liability and punitive damages, but granted judgment n.o.v. with respect to the compensatory damages award, reducing it to $1.00 "nominal compensatory damages." *Brown & Williamson v. Jacobson*, 644 F.Supp. 1240 (N.D. Ill. 1986). In a decision rendered on August 12, 1987, we affirmed the judgment of the district court upholding the punitive damages verdict, but reversed the district court's decision to reduce the compensatory damages award to $1.00. We agreed with the reduction on a different theory but set the figure at $1 million in damages to Brown & Williamson.

Brown & Williamson now asks this court to grant postjudgment interest on the $1 million compensatory damage award dating from the district court's judgment on the original jury verdict, rather than the date of this court's mandate.[1] We reject this view and hold that postjudgment interest should run from the date of our mandate.

Federal Rule of Appellate Procedure 37 provides that where

> a judgment for money in a civil case is affirmed, . . . interest . . . shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

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[1] The parties do not dispute that the postjudgment interest on the $2,050,000 punitive damages should run from the date of the original judgment. Rule 37 dictates this result.

Several Circuit Courts have interpreted this rule in conjunction with 28 U.S.C. § 1961(a).[2] The Eighth and Ninth Circuits have held that after a reversal of a judgment n.o.v., interest should run from the date of the original jury verdict and not from the mandate of the appellate court. *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755 (9th Cir. 1983); *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985). (In both cases the appellate court reinstated the jury verdict without any modification.) The Second Circuit rejected this view and held that interest should not begin to run prior to the date of the appellate court's mandate. *Powers v. New York Cent. R.R.*, 251 F.2d 813, 818 (2d. Cir. 1958). The Fifth Circuit, sitting *en banc*, has chosen a middle path based on the "equities" of each case, refusing to draw a bright line rule. *Affiliated Capital Corp. v. City of Houston*, 793 F.2d 706, 710 (5th Cir. 1986).

We agree with the approach adopted by the Fifth Circuit and follow it here. Although a case by case approach can be problematic, this solution is an inherent outgrowth of Rule 37, which grants the appellate court discretion with respect to allowing interest. Rule 37; Notes of Advisory Committee on Appellate Rules. Often, when the appellate court reverses a judgment n.o.v., there is no justification for imposing interest dating from the original judgment. For example, if the defendant is not liable for damages after the court enters the judgment n.o.v., the defendant obviously is unable to toll the running of interest by paying the plaintiff. Similarly, when judgment n.o.v. is entered, the plaintiff is not entitled to any damages. On the other hand, this should not preclude allowing interest to run from the original judgment in all cases where the appellate court

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[2] Section 1961(a) provides in pertinent part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . . Such interest shall be calculated from the date of the entry of the judgment. . . .

reverses a judgment n.o.v. The jury's original verdict may reflect the present value of money equal to the amount of damages sustained by the plaintiff at the date of judgment. When the appellate court reinstates the jury's verdict for the identical amount some time in the future, the value of the jury verdict is diminished by the lost time value of money. Allowing postjudgment interest to date back to the original judgment in such a case compensates the injured plaintiff and prevents the defendant from reaping any windfall during the course of appeal.

The equities of this case dictate that postjudgment interest run from the date of the entry of our mandate. If interest runs from the date of our mandate, the plaintiffs would not suffer the lost time value of the vacated $3 million verdict. Nor will this result unfairly punish the defendants, who were unable to toll the running of interest until our decision.

We hold, therefore, that postjudgment interest should run on the $1 million compensatory damages from the date of this court's mandate.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 82-2115

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant,

v.

WALTER JACOBSON and CBS, INC.,
Defendants-Appellees.

Argued April 12, 1983

Decided July 14, 1983

Before POSNER and COFFEY, Circuit Judges, and GRANT, Senior District Judge.*

POSNER, Circuit Judge.

This diversity suit brought by Brown & Williamson, the manufacturer of Viceroy cigarettes, charges CBS and Walter Jacobson with libel and other violations of Illinois law. Jacobson is a news commentator for WBBM-TV, a Chicago television station owned by CBS. The defendants moved to dismiss the complaint on a variety of grounds. Without writing an opinion the district court granted the motion "for the reasons set forth in defendants' memoranda," adding only: "to deny this

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* Hon. Robert A. Grant of the Northern District of Indiana, sitting by designation.

motion would unduly restrict the freedom of the press and the right of a journalist to express opinions freely." Brown & Williamson appeals.

In 1975, Ted Bates, the advertising agency that had the Viceroy account, hired the Kennan market-research firm to help develop a new advertising strategy for Viceroy. Kennan submitted a report which stated that for "the younger smoker," "a cigarette, and the whole smoking process, is part of the illicit pleasure category. . . . In the young smoker's mind a cigarette falls into the same category with wine, beer, shaving, wearing a bra (or purposely not wearing one), declaration of independence and striving for self-identity. For the young starter, a cigarette is associated with introduction to sex life, with courtship, with smoking 'pot' and keeping late studying hours. . . ." The report recommended, therefore, the followng pitches to "young smokers, starters": "Present the cigarette as part of the illicit pleasure category of products and activities. . . . To the best of your ability, (considering some legal constraints), relate the cigarette to 'pot', wine, beer, sex, etc. *Don't* communicate health or health-related points." Ted Bates forwarded the report to Brown & Williamson. According to the allegations of the complaint, which on this appeal we must accept as true, Brown & Williamson rejected the "illicit pleasure strategy" proposed in the report, and fired Ted Bates primarily because of displeasure with the proposed strategy.

Years later the Federal Trade Commission conducted an investigation of cigarette advertising, and in May 1981 it published a report of its staff on the investigation. The FTC staff report discusses the Kennan report, correctly dates it to May 1975, and after quoting from it the passages we have quoted states that "B & W adopted many of the ideas contained in this report in the

development of a Viceroy advertising campaign." In support of this assertion the staff report quotes an internal Brown & Williamson document on "Viceroy Strategy," dated 1976, which states, "The marketing efforts must cope with consumers' attitudes about smoking and health, either providing them a *rationale* for smoking a full flavor VICEROY or providing a means of *repressing* their concerns about smoking a full flavor VICEROY." The staff report then quotes a description of three advertising strategies. Although the description contains no reference to young smokers or to "starters," the staff report states: "B & W documents also show that it translated the advice [presumably from the Kennan report] on how to attract young 'starters' into an advertising campaign featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a 'free and easy, hedonistic lifestyle.'" The interior quotation is from another 1976 Brown & Williamson document on advertising strategy.

On November 4, 1981, a reporter for WBBM-TV called Brown & Williamson headquarters and was put in touch with a Mr. Humber in the corporate affairs department. The reporter told Mr. Humber that he was preparing a story on the tobacco industry for Walter Jacobson's "Perspective" program and asked him about the part of the FTC Staff report that dealt with the Viceroy advertising strategy. Humber replied that Brown & Williamson had rejected the proposals in the Kennan report and had fired Ted Bates in part because of dissatisfaction with those proposals.

Walter Jacobson's "Perspective" on the tobacco industry was broadcast on November 11 and rebroadcast on November 12 and again on March 5, 1982. In the broadcast, Jacobson, after stating that "pushing ciga-

rettes on television is prohibited," announces his theme: "Television is off limits to cigarettes and so the business, the killer business, has gone to the ad business in New York for help, to the slicksters on Madison Avenue with a billion dollars a year for bigger and better ways to sell cigarettes. Go for the youth of America, go get 'em guys . . . . Hook 'em while they are young, make 'em start now —just think how many cigarettes they'll be smoking when they grow up." Various examples of how cigarette marketing attempts "to addict the children to poison" are given. The last and longest concerns Viceroy.

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children, that if children are smoking, which they are, more than ever before, it's not the fault of the cigarette business. "Who knows whose fault it is?" says the cigarette business. That's what Viceroy is saying, "Who knows whose fault it is that children are smoking? It's not ours."
>
> Well, there is a confidential report on cigarette advertising in the files of the Federal Government right now, a Viceroy advertising, the Viceroy strategy for attracting young people, starters they are called, to smoking—"FOR THE YOUNG SMOKER . . . . A CIGARETTE FALLS INTO THE SAME CATEGORY WITH WINE, BEER, SHAVING OR WEARING A BRA. . . ." says the Viceroy strategy—"A DECLARATION OF INDEPENDENCE AND STRIVING FOR SELF-IDENTITY." Therefore, an attempt should be made, says Viceroy, to ". . . PRESENT THE CIGARETTE AS AN INITIATION INTO THE ADULT WORLD," to ". . . PRESENT THE CIGARETTE AS AN ILLICIT PLEASURE . . . A BASIC SYMBOL OF THE GROWING-UP, MATURING PROCESS." An attempt should be made, says the Viceroy slicksters, "TO RELATE

> THE CIGARETTE TO 'POT', WINE, BEER, SEX. DO NOT COMMUNICATE HEALTH OR HEALTH-RELATED POINTS." That's the strategy of the cigarette slicksters, the cigarette business which is insisting in public, "We are not selling cigarettes to children."
>
> They're not slicksters, they're liars.

While Jacobson is speaking those lines the television screen is showing Viceroy ads published in print media in 1980. Each ad shows two packs of Viceroys alongside a golf club and ball.

The complaint charges that the broadcast made statements about Brown & Williamson that the defendants knew to be false and that not only were libelous per se and injurious to Brown & Williamson but also wrongfully interfered with Brown & Williamson's business relations and violated two Illinois statutes, the Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat.1981, ch. 121½, ¶¶ 261 *et seq.*, and the Uniform Deceptive Business Trade Practices Act, Ill.Rev.Stat.1981, ch. 121½, ¶¶ 311 *et seq.* We begin with the defamation count. Since the district court accepted all of the grounds for dismissal advanced by the defendants, we must decide whether any of these grounds—other than those abandoned in this court, as some have been—supports dismissal.

One ground is that the broadcast is not libelous per se. If it is not, the complaint does not state a claim under the Illinois common law of defamation (the parties agree that Illinois law governs all of the substantive issues in this diversity case) unless it adequately alleges special damage, which the district court found it did not.

Under traditional principles, a finding of libel per se ("per se" in defamation law meaning just that pecuniary damage—"special damage"—need not be proved) requires only that the defamatory character of the statement alleged to be libelous be apparent on the face of the state-

ment, or in other words that "extrinsic facts" not be necessary to make the statement defamatory. (If the statement was that Mrs. Jones had given birth on January 11, 1939, the extrinsic fact necessary to complete the libel might be that Mrs. Jones had married the child's father the previous month.) The defendants admitted at oral argument that the fact that Walter Jacobson's broadcast did not mention Brown & Williamson by name was not an extrinsic fact in this sense. See *Hambric v. Field Enterprises, Inc.*, 46 Ill.App.2d 355, 359, 196 N.E.2d 489, 492 (1964); *Harwood Pharmacal Co. v. National Broadcasting Co.*, 9 N.Y.2d 460, 214 N.Y.S.2d 725, 174 N.E.2d 602 (1961). The reason for distinguishing between statements that are and statements that are not libelous on their face is that the impact of an apparently innocuous statement will be limited to the presumably small group of readers who know additional facts, so damage cannot be presumed but must be proved. The Jacobson broadcast was not innocuous on its face, and the fact that Brown & Williamson was not mentioned by name is relevant not to whether the broadcast was libel per se but to the distinct question whether it would be understood as referring to Brown & Williamson rather than to someone else. The defendants do not deny it would be.

So the broadcast is libel per se in the traditional sense—unless the aspersions that it casts on Brown & Williamson's corporate character cannot be considered defamatory at all, which is hardly tenable. But Illinois has abolished the distinction between slander and libel and in the process has assimilated libel per se to the quite different concept of slander per se, rather than vice versa. E.g., *Mitchell v. Peoria Journal-Star, Inc.*, 76 Ill. App.2d 154, 158-60, 221 N.E.2d 516, 519-20 (1966); *Grabavoy v. Wilson*, 87 Ill.App.2d 193, 202, 230 N.E.2d 581, 585 (1967); *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n*, 106 Ill.App.3d 626, 629 and

n. 1, 62 Ill.Dec. 325, 328 and n. 1, 435 N.E.2d 1297, 1300 and n. 1 (1982). (*Stanley v. Taylor*, 4 Ill.App.3d 98, 104, 278 N.E.2d 824, 828 (1972), looks the other way, but is unclear as well as outnumbered.) Slander per se unlike libel per se depends on the character as well as completeness of the defamatory statement. Under traditional principles, an utterance is slander per se only if it imputes to the plaintiff (1) crime, (2) unchastity (if the plaintiff is female), (3) a loathsome disease, or (4) anything likely to discredit the plaintiff in his trade or business. Prosser, Handbook of the Law of Torts 756-60 (4th ed. 1971).

Jacobson's broadcast fits the fourth category. The defendants argue that since a cigarette company cannot survive in the long run if young people do not take up smoking, the broadcast will be understood in the business community as complimenting Brown & Williamson for its aggressive efforts to hook the young on smoking. But we doubt that a cigarette company could survive in the short run and thus be around to enjoy the long run if it flouted the strong public policy against encouraging children to smoke, a policy expressed for example in the ban on cigarette television advertising in section 6 of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1335. The Senate Report on the bill asked the FTC to include in the biennial reports on cigarette labeling and advertising that are required by section 8(a) of the Act, 15 U.S.C. § 1337(a), "an analysis of public opinion polls and other relevant information indicating the extent to which the American public, especially young people, have been made fully aware of the hazards of smoking . . . ." S.Rep. No. 566, 91st Cong., 1st Sess. 11 (1969), U.S. Code Cong. & Admin.News 1970, pp. 2652, 2662. The Report adds: "The committee cannot overstate its strong desire that the cigarette industry not only honor its statement carefully to limit print advertising so as not to appeal to youth, but that it will also exercise restraint in the overall use of print advertising and other forms

of promotion." *Id.* See also Ill.Rev.Stat.1981, ch. 23, ¶¶ 2357-58, making it an offense to sell cigarettes to minors.

A modern American corporation, especially one owned by a foreign company (Brown & Williamson is the wholly owned subsidiary of an English conglomerate corporation), cannot proclaim "the public be damned" as its motto. If it openly defied the views passionately held by a substantial segment of the public, the Congress, and government agencies such as the FTC, it would be inviting serious trouble on many fronts. Obviously it would have been grossly defamatory for Walter Jacobson to have accused Brown & Williamson of poisoning children; yet that is what he did in effect—indeed in those words, though used figuratively rather than literally. It is irrelevant that some unreconstructed businessmen might approve of what Walter Jacobson accused Brown & Williamson of doing. "If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable body of the community, liability is not a question of majority vote." *Peck v. Tribune Co.*, 214 U.S. 185, 190, 29 S.Ct. 554, 556, 53 L.Ed. 960 (1909) (per Holmes, J.).

We have been assuming that in merging libel and slander Illinois merely extended the traditional categories of slander per se to written (or what is nowadays treated as the same thing, broadcast) statements. But those categories have long been thought anachronistic and two of them, in today's moral climate, are merely quaint. So it is not surprising that in the course of merging libel and slander the Illinois courts have altered the traditional categories. Chastity has been dropped; "loathsome disease" has been replaced with "a communicable disease which would exclude one from society"; and discrediting people in their trades or businesses has become two categories—"imput[ing] . . . inability to perform or want of integrity in the discharge of duties of office or employ-

ment" and "prejudic[ing] a person in his profession or trade." *American Pet Motels, Inc. v. Chicago Vetinary Medical Ass'n, supra*, 106 Ill.App.3d at 629, 62 Ill.Dec. at 328, 435 N.E.2d at 1300. And even a statement that falls within one of those categories is not necessarily slander per se any more. The statement must be sufficiently defamatory to justify an award of damages without proof of actual damage. "Words are libelous *per se* if they are 'so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be, and is, dispensed with.'" *Id.*, quoting *Reed v. Albanese*, 78 Ill.App.2d 53, 58, 223 N.E.2d 419, 422 (1966). See also *Costello v. Capital Cities Media, Inc.*, 111 Ill.App.3d 1009, 1011, 67 Ill.Dec. 721, 723, 445 N.E.2d 13, 15 (1982).

Under contemporary as under traditional Illinois law, Jacobson's broadcast is libelous per se. Accusing a cigarette company of what many people consider the immoral strategy of enticing children to smoke—enticing them by advertising that employs themes exploitive of adolescent vulnerability—is likely to harm the company. It may make it harder for the company to fend off hostile government regulation and may invite rejection of the company's product by angry parents who smoke but may not want their children to do so. These harms cannot easily be measured, but so long as some harm is highly likely the difficulty of measurement is an additional reason, under the modern functional approach of the Illinois courts, for finding libel per se rather than insisting on proof of special damage. In the *American Pet Motels* case the alleged libel consisted of a statement that persons who were not veternarians had treated a cat at the plaintiff's pet "motel" for a parasite infection and that the state's attorney would be notified of the incident. The statement may have prejudiced the plaintiff in its business but the likely prejudice was too slight to dispense with proof of special damage. See 106 Ill.App.3d at 629, 62 Ill.Dec. at

328, 435 N.E.2d at 1300. The libel in the present case falls in one of the new as well as old per se categories—it prejudices the plaintiff in its trade—and it also has the required gravity.

But the defendants argue that Illinois has special and restrictive rules governing the defamation of a corporation. They cite a 1965 decision by this court which states that to allow a corporation to recover on a theory of libel per se under Illinois law "there must be a showing that it has been accused of fraud, mismanagement, or financial instability." *Continental Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395, 397 (7th Cir.1965). For this statement, not further amplified in the opinion, the court cited only *Interstate Optical Co. v. Illinois State Soc'y of Optometrists*, 244 Ill.App. 158 (1927). Since the plaintiff in *Interstate Optical Co.*, had been accused of unethical conduct rather than fraud in any financial sense, *Continental Nut* probably uses the word "fraud" in a broad sense; and, defined broadly, "fraud" describes the conduct that Walter Jacobson attributed to Brown & Williamson. The promotion of cigarettes to susceptible youngsters is analogous to overreaching—"fraud" in an acceptable sense—by a child's guardian. In *Continental Nut* a competitor accused the plaintiff of importing nuts that were not properly cured and would therefore shrink and become mouldy, and added that "somebody is going to be in trouble" if the Food and Drug Administration's inspectors determined that the nuts did not meet proper standards. 345 F.2d at 397. This was product disparagement, which as we shall see is a tort distinct from defamation; if there was defamation of the company, as distinct from disparagement of its product, it was far milder than in the present case.

No Illinois case before or after *Continental Nut* suggests that the standards for proof of defamation are different for corporations than for other plaintiffs. The cases treat corporate plaintiffs just like individuals. See,

e.g., *Halpern v. News-Sun Broadcasting Co.*, 53 Ill.App. 3d 644, 11 Ill.Dec. 454, 368 N.E.2d 1062 (1977). Obviously some types of defamation—imputations of unchastity, for example—are not applicable to corporate plaintiffs. Probably, therefore, this court's statement in *Continental Nut* that the plaintiff had to show "fraud, mismanagement, or financial instability" was an effort to summarize the types of defamation to which corporations are susceptible, rather than an assertion, without any basis in Illinois law, that corporations are disfavored plaintiffs in defamation cases. A corporation cannot have a reputation for chastity but it can have a reputation for adhering to the moral standards of the community in which it sells its products and if that reputation is assailed in a fashion likely to harm the corporation seriously the corporation has been libeled under Illinois law.

Although Brown & Williamson therefore did not have to plead special damage in order to resist dismissal of its defamation count, such damage, if proved, may of course be recovered in a per se as well as in a per quod suit. But "when items of special damage are claimed, they shall be specifically stated." Fed.R.Civ.P. 9(g). Whether this requirement is satisfied in a diversity case is a matter of federal rather than state law, for reasons explained in Note, *The Definition and Pleading of Special Damage Under the Federal Rules of Civil Procedure*, 55 Va.L.Rev. 542, 553-58 (1969).

The complaint states that "BROWN & WILLIAMSON has been injured and is likely to continue to suffer injury as a result of the natural tendency of the defendants' false and malicious statements to undermine BROWN & WILLIAMSON's general reputation for honesty and to decrease its sales and good will by falsely portraying the manufacturer of VICEROY cigarettes as immoral, degenerate and criminal. In addition, the defendants' continuing rebroadcast of the false and malicious Cigarette Advertising Broadcast threatens to destroy or nearly de-

stroy the value of BROWN & WILLIAMSON's investment in VICEROY advertising between 1978 and 1981." The reference to injury through the natural tendency of the alleged libel to decrease Brown & Williamson's sales, and the reference to the danger that the value of Brown & Williamson's recent Viceroy advertising will be destroyed or nearly destroyed (perhaps implying that it has already been injured), may well be attempts to plead actual, realized pecuniary injury. But such special damage is not explicitly, and therefore not specifically, alleged. In *Continental Nut*, "plaintiff listed specific figures of its gross sales before and after the publication and averred that the decrease in sales was the 'natural and proximate result' of the letter," 345 F.2d at 397; and in *Fleck Bros. v. Sullivan*, 385 F.2d 223, 225 (7th Cir.1967), the plaintiff alleged that the libel had caused it to make an expenditure of money. Thus in both cases actual pecuniary damage was alleged, with enough if not great specificity. Although the Note in the *Virginia Law Review* proposes in effect to read the words, "shall be specifically stated," out of Rule 9(g), as being inconsistent with the notice-pleading philosophy of the Federal Rules, and there is judicial support for this approach, see, e.g., *Rannels v. S.E. Nichols, Inc.*, 591 F.2d 242, 247 (3d Cir.1979), we do not consider ourselves authorized to rewrite the rule. We are not even sure the requirement of specificity has no function. It enables groundless per quod defamation cases to be dismissed at an early stage in the litigation; and although that policy is not applicable to this case we cannot ignore the unqualified command of the rule. *Barton v. Barnett*, 226 F.Supp. 375, 377-78 (N.D.Miss.1964), which supports our approach to the interpretation of Rule 9(g), was cited with approval by this court in *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579, 583-84 (7th Cir.1975).

But Brown & Williamson must be allowed to plead over (unless the dismissal of the complaint can be upheld on

other grounds). The defendants' argument that by appealing from the district court's judgment dismissing the complaint rather than moving for leave to file an amended complaint Brown & Williamson elected to stand on the original complaint is untenable. Since the district court dismissed the complaint on a variety of grounds, only one of which related to special damage, the court would also have had to deny any motion to file an amended complaint for the purpose of curing the deficiency in the plea for special damage. The filing of such a motion would therefore have been futile, and was not required.

The defendants also argue and the district court also found that the libel was privileged as a fair and accurate summary of the Federal Trade Commission staff's report on cigarette advertising. The parties agree as they must that Illinois recognizes a privilege for fair and accurate summaries of, or reports on, government proceedings and investigations. See *Lulay v. Peoria Journal-Star, Inc.*, 34 Ill.2d 112, 214 N.E.2d 746 (1966); *Halpern v. News-Sun Broadcasting Co., supra*, 53 Ill.App.3d at 644, 11 Ill.Dec. at 461, 368 N.E.2d at 1069. They agree that the privilege extends to a public FTC staff report on an investigation. But they disagree over whether Jacobson's summary of the FTC staff report was "fair," that is, whether the overall impression created by the summary was no more defamatory than that created by the original. See Restatement (Second) of Torts § 611, Comment f (1977). Since this is a question of fact, *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, 749, 47 Ill.Dec. 429, 441, 415 N.E.2d 434, 446 (1980); *Tunney v. American Broadcasting Co.*, 109 Ill.App.3d 769, 776, 65 Ill.Dec. 294, 299, 441 N.E.2d 86, 91 (1982), and the case was dismissed on the pleadings, all we need decide is whether the fairness of the Jacobson summary emerges so incontrovertibly from a comparison of the FTC staff report with the broadcast that no rational jury considering these documents with the aid of whatever additional evidence

Brown & Williamson might introduce could consider the summary unfair.

Although the FTC report (and the Kennan report from which it quotes) refers to the targets of the Viceroy advertising campaign as "young smokers" and "starters," not as children, the broadcast implies that the campaign is aimed at children; for after quoting from the Kennan report as quoted by the FTC staff, Jacobson comments: "That's the strategy of the cigarette slicksters, the cigarette business which is insisting in public, 'We are not selling cigarettes to children.' They're not slicksters, they're liars." Also, although the quotations in the broadcast are from the Kennan report rather than from any document written inside Brown & Williamson, and this is clearly indicated in the FTC staff report, the broadcast implies that they are quotations from Brown & Williamson. For example, Jacobson states that "an attempt should be made, says Viceroy"—and there follow quotations from the Kennan report without identification of the true source. This is misleading. True, the FTC staff report does state that Brown & Williamson "adopted many of the ideas in" the Kennan report, and does not say which these were. But its quotations from Brown & Williamson's "Viceroy Strategy" paper imply that they were the ideas of repressing any concerns about the health hazards of smoking and of attracting young smokers by an advertising campaign associating smoking with a "free and easy, hedonistic lifestyle"; there is no suggestion that Brown & Williamson adopted Kennan's specific proposal, quoted by Jacobson, "to relate the cigarette to 'pot', wine, beer, sex," or to "wearing a bra." Jacobson also deleted the qualification, "considering some legal constraints," and omitted mention of the fact that the Kennan report had been written six years before and that the advertising campaign which the FTC staff thought based in part on that report had been conducted five years before. The omission was misleading because

the juxtaposition of the audio portion of the broadcast with current Viceroy advertising implied that Viceroy was continuing to employ the disreputable methods recommended by the Kennan report (though the connection between golf and a strategy of enticing children is obscure).

The fact that there are discrepancies between a libel and the government report on which it is based need not defeat the privilege of fair summary. Unless the report is published verbatim it is bound to convey a somewhat different impression from the original, no matter how carefully the publisher attempts to summarize or paraphrase or excerpt it fairly and accurately. An unfair summary in the present context is one that amplifies the libelous effect that publication of the government report verbatim would have on a reader who read it carefully—that carries a "greater sting," *Tunney v. American Broadcasting Co., supra*, 109 Ill.App.3d at 775, 65 Ill.Dec. at 298, 441 N.E.2d at 90. The FTC staff report conveys the following message: six years ago a market-research firm submitted to Brown & Williamson a set of rather lurid proposals for enticing young people to smoke cigarettes and Brown & Williamson adopted many of its ideas (though not necessarily the specific proposals quoted in the report) in an advertising campaign aimed at young smokers which it conducted the following year. The Jacobson broadcast conveys the following message: Brown & Williamson currently is advertising cigarettes in a manner designed to entice children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures of youth. So at least a rational jury might interpret the source and the summary, and if it did it would be entitled to conclude that the summary carried a greater sting and was therefore unfair.

Brown & Williamson argues that even if the Jacobson broadcast fairly summarized the FTC staff report the defendants forfeited the privilege of fair summary be-

cause they knew that the staff report was false in a crucial particular—the assertion that Brown & Williamson had adopted many of the ideas in the Kennan report. The defendants reply that the mere fact that Brown & Williamson told their reporter that the assertion was false does not either make it false or mean they knew it was false. This is correct but we must assume for purposes of this appeal that Brown & Williamson can prove that the defendants knew the assertion to be false. The question is whether this would save the defamation count if the jury found that the broadcast was a fair summary after all.

In *Lulay v. Peoria Journal-Star, Inc., supra,* 34 Ill.2d at 115, 214 N.E.2d at 748, the Illinois Supreme Court adopted the formulation of the privilege of fair summary of government proceedings or reports in the first Restatement. In this formulation the privilege is forfeited if the summary is "made solely for the purpose of causing harm to the person defamed." Restatement of Torts § 611(b) (1938). This—the everyday—sense of malice is sometimes called "express malice" to distinguish it from "actual malice," which in the modern law of defamation means knowledge that a statement is false or reckless disregard for its truth or falsity. The first Restatement contains no suggestion that actual malice would defeat the privilege of fair summary of government reports, nor does *Lulay*; and the second Restatement, published after *Lulay,* deleted section 611(b), a change that implies that the draftsmen thought the privilege absolute. Restatement (Second) of Torts § 611 (1977). Yet in *Catalano v. Pechous,* 83 Ill.2d 146, 168-70, 50 Ill.Dec. 242, 252-53, 419 N.E.2d 350, 360-61 (1980), the Illinois Supreme Court appears to have treated the question whether the privilege is forfeited by proof of actual malice as open. And in our recent decision in *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 535 (7th Cir.1982), and the Illinois Appellate Court's recent

decision in *Tunney v. American Broadcasting Co., supra,* 109 Ill.App.3d at 775, 65 Ill.Dec. at 298, 441 N.E.2d at 90, *Catalano* is cited as authority for the proposition that the privilege is forfeited by such proof. Both these decisions can be criticized, however, for having read more into *Catalano* than can fairly be found there; and though we are bound by authoritative state court rulings on matters of state law whether or not we consider those rulings well reasoned, we are not bound to follow a state intermediate appellate ruling (*Tunney*) that is inconsistent with a state supreme court ruling (*Lulay*). But besides *Tunney* there is *Halpern v. News-Sun Broadcasting Co., supra,* 53 Ill.App.2d at 653-54, 11 Ill.Dec. at 461, 368 N.E.2d at 1069, which preceded *Catalano* and which held that actual malice is evidence of express malice—though maybe only when the summary is inaccurate.

The truth is that Illinois law is in disarray on the question whether actual malice defeats the privilege of fair summary. This is not suprising; it is a difficult question. The facts of *Gertz* illustrate the case for using actual malice to defeat the privilege in at least some circumstances. The plaintiff there had been described as a "Communist-fronter," "Leninist," and "Marxist" in a long and radically uncomplimentary article about him in the defendant's magazine. Only one statement in the article—that the plaintiff had been a member of the National Lawyers' Guild—was even arguably a fair summary of material appearing in a government document (a 1951 report of a congressional committee), and it was with reference to that statement alone that we held that the privilege was forfeited if publication had been with actual malice. See 680 F.2d at 537. If you embellish a defamatory statement with accusations you know to be false, taken from ancient government reports that have no claim to contemporary credence, your repetition of those stale accusations is not privileged; that is as far as *Gertz* need be interpreted to go.

Suppose instead that a newspaper merely publishes without comment the daily transcript of a sensational criminal trial. The transcript includes scurrilous accusations against the defendant which the newspaper's staff believes to be false and which are in fact false, as shown by the fact that not only is the defendant acquitted but the prosecutor later apologizes for having prosecuted an innocent man. It is unclear that the privilege of republishing government documents (which a trial transcript is, in effect) in fair and accurate fashion would be forfeited in such a case. The trial would be newsworthy and the newspaper could reasonably believe that its readers ought to be allowed to form their own conclusions regarding the truth of the accusations. In such a case the Illinois courts might—the very recent decision in *Emery v. Kimball Hill, Inc.*, 112 Ill.App.3d 109, 114, 67 Ill.Dec. 767, 770, 445 N.E.2d 59, 62 (1983), suggests they would—hold that the privilege was not forfeited; and if they held it was, a serious First Amendment question would be raised. But we need not decide on this appeal whether or when the privilege to republish government reports is forfeited by proof of actual malice. The issue will become moot if the jury finds that the Jacobson broadcast was not a fair summary of the FTC staff report, as well it may. We merely express our doubts that *Gertz* goes as far as a quick reading of our opinion in that case might appear to indicate or that *Tunney* and *Halpern* are authoritative on the question whether actual malice always forfeits the privilege of fair summary of government documents.

Apart from concern that blanket recognition of an actual-malice exception to the privilege of summarizing government documents might make it difficult for the media to keep the public abreast of government activity—which may be the concern behind the district court's brief allusion to the First Amendment—there are no First Amendment issues before us on this appeal. The

defendants do not argue that as a large corporation Brown & Williamson is a "public figure." See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 586-93 (1st Cir.1980), and cases cited there, on the general question. Whether they have waived any such argument by their silence is not a question we need decide here, but we observe in passing that if the purpose of the public figure-private person dichotomy is to protect the privacy of individuals who do not seek publicity or engage in activities that place them in the public eye, there seems no reason to classify a large corporation as a private person. (The First Circuit rejected this argument in *Bruno & Stillman*, however; see 633 F.2d at 590.) But at least for purposes of this appeal Brown & Williamson is a private person, and as such its way is not barred by the First Amendment provided that it does not advance a theory of strict liability and does not seek general and punitive damages without being prepared to prove actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 349-50, 94 S.Ct. 2997, 3010, 3011-12, 41 L.Ed. 2d 789 (1974). It does seek such damages but is prepared to prove actual malice; and Illinois law requires proof of negligence in defamation cases as the minimum condition for establishing liability. See *Gertz v. Robert Welch, Inc., supra*, 680 F.2d at 537 n. 17. Of course if Brown & Williamson does prove actual malice it can recover damages—actual, general, and punitive—even if it is a public figure.

This completes our discussion of the defamation count and we turn to the others, which were also dismissed—and which are makeweights that require only brief discussion. If one person persuades another to break a contract with a third, he commits the tort of wrongful interference with business relations. *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill.App.3d 359, 300 N.E. 2d 331 (1973). Any libel of a corporation can be made to resemble in a general way this archetypal wrongful-

interference case, for the libel will probably cause some of the corporation's customers to cease doing business with it; and whether this involves an actual breaking of contracts or merely a withdrawal of prospective business would make no difference under the modern law of wrongful interference. But this approach would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations with which the law of defamation—presumably to some purpose—is hedged about. We doubt that the Illinois courts would allow this end run around their rules on defamation, and we therefore need not consider any constitutional implications of their doing so. *Crinkley v. Dow Jones & Co.*, 67 Ill.App.3d 869, 880, 24 Ill.Dec. 573, 581, 385 N.E.2d 714, 722 (1978), is instructive. The court dismissed the wrongful-interference counts in a suit, not unlike the present one, against a publisher because there was no allegation that the defendant *intended* to interfere with the plaintiff's relationship with third parties. This was a pleading point but it is evident that Brown & Williamson does not believe that the defendants' interest was otherwise than to attract viewers to Jacobson and CBS; the complaint alleges that the broadcast was "designed solely to increase the audience ratings of and attract attention to WBBM-TV."

Crinkley also disposes of Brown & Williamson's claim that the defendants violated the Illinois Consumer Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trade Practices Act. See 67 Ill.App.3d at 877, 24 Ill.Dec. at 578-79, 385 N.E.2d at 719-20. These Acts provide a remedy for disparagement of a product, but that is different from the disparagement of the producer, i.e., from defamation. The Jacobson broadcast does not suggest that Viceroy cigarettes are defective, or any more unhealthful than other brands of cigarettes; so there is no product disparagement, and we need not decide

whether, if there were, it would be actionable when the disparagement was by the news media rather than by a competing producer.

The judgment dismissing Count I of the complaint (defamation) is reversed and the case is remanded for further proceedings consistent with this opinion. The judgment dismissing the other counts is affirmed. There will be no award of costs in this court, and Circuit Rule 18 shall apply on remand.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 1648

WILLIAM T. HART, Judge

BROWN & WILLIAMSON TOBACCO CO.

v.

WALTER JACOBSON and CBS, INC.

DOCKET ENTRY

August 7, 1986

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that: (1) Defendants' motion for judgment notwithstanding the verdict or a new trial is denied as to liability. (2) Defendants' motion for judgment notwithstanding the verdict is granted as to compensatory damages and the court enters judgment in the amount of $1.00 as nominal compensatory damages. (3) Defendants' motion for judgment notwithstanding the verdict, a new trial, or a remittitur as to punitive damages is denied. Punitive damages shall stand at two million dollars as to CBS and fifty thousand dollars as to Jacobson.

/s/ William T. Hart
WILLIAM T. HART
Judge

For further detail see order attached to the original minute order form.

Notices mailed by judge's staff.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

No. 82 C 1648

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff,

v.

WALTER JACOBSON and CBS, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER

Defendants Walter Jacobson and CBS, Inc. move to vacate the judgment entered against them and to enter judgment in their favor notwithstanding the verdicts or, in the alternative, for a substantial remittitur of damages or a new trial.

The complaint upon which this case was tried was initially dismissed. On appeal it was upheld and the case was remanded for trial. *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262 (7th Cir. 1983). The Court of Appeals held that a television broadcast stating that advertising designed to attract children to smoke by associating smoking with pleasurable illicit activity—pot, wine, beer and sex—was libelous per se because it accused plaintiff Brown & Williamson Tobacco Co. ("B&W") of immoral conduct.

The Court of Appeals accurately described the nature of this case (as shown by the evidence at trial) as follows:

> In 1975, Ted Bates, the advertising agency that had the Viceroy account, hired the Kennan market-

research firm to help develop a new advertising stategy for Viceroy. Kennan submitted a report which stated that for "the younger smoker," "a cigarette, and the whole smoking process, is part of the illicit pleasure category. . . . In the young smoker's mind a cigarette falls into the same category with wine, beer, shaving, wearing a bra (or purposely not wearing one), declaration of independence and striving for self-identity. For the young starter, a cigarette is associated with introduction to sex life, with courtship, with smoking 'pot' and keeping studying hours. . . ." The report recommended, therefore, the following pitches to "young smokers, starters": "Present the cigarette as part of the illicit pleasure category of products and activities. . . . To the best of your ability, (considering some legal constraints), relate the cigarette to 'pot,' wine, beer, sex, etc. *Don't* communicate health or health-related points." Ted Bates forwarded the report to Brown & Williamson. . . . Brown & Williamson rejected the "illicit pleasure strategy" proposed in the report, and fired Ted Bates primarily because of displeasure with the proposed strategy.

Years later the Federal Trade Commission conducted an investigation of cigarette advertising, and in May 1981 it published a report of its staff on the investigation. The FTC staff report discusses the Kennan report, correctly dates it to May 1975, and after quoting from it the passages we have quoted states that "B & W adopted many of the ideas contained in this report in the development of a Viceroy advertising campaign." In support of this assertion the staff report quotes an internal Brown & Williamson document on "Viceroy Strategy," dated 1976, which states, "The marketing efforts must cope with consumers' attitudes about smoking and health, either providing them a *rationale* for smoking a full

flavor VICEROY or providing a means of *repressing* their concerns about smoking a full flavor VICEROY." The staff report then quotes a description of three advertising strategies. Although the description contains no reference to young smokers or to "starters," the staff report states: "B & W documents also show that it translated the advice [presumably from the Kennan report] on how to attract young 'starters' into an advertising campaign featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a 'free and easy, hedonistic lifestyle.'" The interior quotation is from another 1976 Brown & Williamson document on advertising strategy.

On November 4, 1981, a reporter for WBBM-TV called Brown & Williamson headquarters and was put in touch with a Mr. Humber in the corporate affairs department. The reporter told Mr. Humber that he was preparing a story on the tobacco industry for Walter Jacobson's "Perspective" program and asked him about the part of the FTC staff report that dealt with the Viceroy advertising strategy. Humber replied that Brown & Williamson had rejected the proposals in the Kennan report and had fired Ted Bates in part because of dissatisfaction with those proposals.

Walter Jacobson's "Perspective" on the tobacco industry was broadcast on November 11 and rebroadcast on November 12 and again on March 5, 1982. In the broadcast, Jacobson, after stating that "pushing cigarettes on television is prohibited," announces his theme: "Television is off limits to cigarettes and so the business, the killer business has gone to the ad business in New York for help, to the slicksters on Madison Avenue with a billion dollars a year for bigger and better ways to sell ciga-

rettes. Go for the youth of America, go get 'em guys. . . . Hook 'em while they are young, make 'em start now—just think how many cigarettes they'll be smoking when they grow up." Various examples of how cigarette marketing attempts "to addict the children to poison" are given. The last and longest concerns Viceroy.

The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children, that if children are smoking, which they are, more than ever before, it's not the fault of the cigarette business. That's what Viceroy is saying, "Who knows whose fault it is that children are smoking? It's not ours."

Well, there is a confidential report on cigarette advertising in the files of the Federal Government right now, a Viceroy advertising, the Viceroy strategy for attracting young people, starters they are called, to smoking—"FOR THE YOUNG SMOKER. . . . A CIGARETTE FALLS INTO THE SAME CATEGORY WITH WINE, BEER, SHAVING OR WEARING A BRA. . . ." says the Viceroy strategy —"A DECLARATION OF INDEPENDENCE AND STRIVING FOR SELF-IDENTITY." Therefore, an attempt should be made, says Viceroy, to '. . . PRESENT THE CIGARETTE AS AN INITIATION INTO THE ADULT WORLD," to ". . . PRESENT THE CIGARETTE AS AN ILLICIT PLEASURE . . . A BASIC SYMBOL OF THE GROWING-UP, MATURING PROCESS." An attempt should be made, says the Viceroy slicksters, "TO RELATE THE CIGARETTE TO 'POT,' WINE, BEER, SEX. DO NOT COMMUNICATE HEALTH OR HEALTH-RELATED POINTS." That's the strategy of the cigarette slicksters, the cigarette business which is insisting in public, "We are not selling cigarettes to children."

They're not slicksters, they're liars.

Id. at 266.

The liability and damage issues were bifurcated with the same jury hearing the evidence on both liability and damages. Pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, the jury made separate findings on the liability issues. The jury found that: (1) plaintiff proved by a preponderance of the evidence that defendants' broadcast was "of and concerning" B&W; (2) plaintiff proved by a preponderance of the evidence that defendants' broadcast was substantially false; (3) plaintiff proved by clear and convincing evidence that defendants knew the broadcast was false or recklessly disregarded whether or not the broadcast was false; and (4) defendants did not prove by a preponderance of the evidence that the broadcast was a "fair summary" of portions of a government report. After hearing evidence with respect to damages the jury awarded B&W $3 million in general damages, $2 million in punitive damages from CBS, and $50,000 in punitive damages from Jacobson.

Defendants contend that they are entitled to post-trial relief because the jury's findings and verdicts are against the manifest weight of the evidence; evidence offered by plaintiff was improperly received or evidence offered by defendants was improperly excluded; instructions tendered were improperly given or refused; defendants were precluded from asserting to the jury the defense of opinion; punitive damages are unconstitutional; and the amount of compensatory and punitive damages was excessive. Defendants request in the alternative that the court order a remittitur.

I. Liability

Under Illinois law, which governs in this diversity case, judgment notwithstanding the verdict is granted "only in those cases in which all of the evidence, when

viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on the evidence could ever stand." *Pedrick v. Peoria and Eastern Railroad*, 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (1967); *General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc.*, 695 F.2d 281, 285-86 (7th Cir. 1982). The standard of review for a new trial is also strict. The court may not second guess a jury or substitute its view for that of the jury. *Robison v. Lescrenier*, 721 F.2d 1101, 1104 (7th Cir. 1983); *Continental Airlines, Inc. v. Wagner-Morehouse, Inc.*, 401 F.2d 23, 30 (7th Cir. 1968). All disputes concerning the reasonable inferences to be drawn from the evidence must be resolved against the moving party. The credibility of the witnesses is a matter for the jury and not for the court. *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349, 353 (7th Cir. 1974).

To assure that the judgment does not constitute a forbidden intrusion in the field of free expression, an independent examination of the record must be made to determine whether the jury's finding of actual malice is supported by clear and convincing evidence. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (U.S. June 25, 1986). While *Bose* requires this review of the record, the *Bose* court specifically noted that "due regard" should be given to the factfinder's opportunity "to observe the demeanor of the witnesses; the constitutionally-based rule of independent review permits this opportunity to be given its due." 466 U.S. at 499-500.

Keeping these principles in mind the court must determine whether or not the evidence presented at trial supports the fact findings made by the jury.

A. Of and Concerning B&W

The jury first found that the broadcast was of and concerning B&W. Though B&W was not mentioned by name in the broadcast it is admittedly the only manufacturer of Viceroy cigarettes. The name and address of B&W is on every package of Viceroy brand cigarettes. Photographs of Viceroy cigarettes were displayed on the television screen while the broadcast was underway. The broadcast concerned B&W if viewers of the broadcast reasonably understood the statement to refer to B&W. The statement need not mention B&W by name and it is not necessary that everyone who saw the broadcast actually understood the statement to refer to it. It is sufficient that persons who know B&W would understand the statement to refer to it. *Archibald v. Belleville News Democrat*, 54 Ill.App.2d 38, 203 N.E.2d 281, 283 (5th Dist. 1964). Given the evidence presented, the jury's finding that plaintiff proved by a preponderance of the evidence that the broadcast complained of was understood to be about B&W is supported by substantial evidence and is not against the manifest weight of the evidence.[1]

B. Falsity

The jury found that plaintiff proved by a preponderance of the evidence that defendants' broadcast was substantially false. The evidence shows that on November 11-12, 1981, Jacobson broadcast a "Perspective" on CBS's WBBM-TV station in Chicago concerning cigarette advertising. As he spoke them, those parts of Jacobson's statement that he characterized as quotations from a confidential government report purportedly dealing with Viceroy's advertising and advertising strategy

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[1] The Court of Appeals opinion indicates that defendants conceded this point on appeal. *Brown & Williamson*, 713 F.2d at 267. Because defendants had not answered the complaint when the case was before the Court of Appeals, they were permitted to dispute this element at trial.

were printed on the screen–alongside pictures of a portion of an actual Viceroy advertisement showing two packs of Viceroy Rich Lights, a golf ball, and part of a golf club.

B&W put before the jury what the evidence showed to be every ad published by Viceroy from 1975 to 1982. The jury could reasonably have found from an examination of those advertisements that there was no pot, wine, beer and sex ad in this group. Defendants do not contend otherwise. Indeed, on cross examination defendant Jacobson admitted that he did not know of any such advertisements and that he did not believe that Viceroy ever ran such advertisements (Tr. 1246).

B&W preesnted the testimony of individuals with knowledge regarding Viceroy advertising and B&W's relationship with its ad agency, Ted Bates and the MARC research firm which provided the so-called Kennan report for Ted Bates and B&W. These witnesses stated that there was no strategy or plan designed to attract children to smoke by reference to pot, wine, beer and sex or any other device. Rather, they testified B&W had a policy forbidding any advertising directed to persons under 21 and that policy was in accordance with a cigarette manufacturers' code forbidding such advertising.

An exhibit not put before the jury, defendants' Exhibit 57, was a collection of proposed ads, or artists' renderings which were characterized as exploitive of a sex theme. As there was no showing that these ads had in fact been accepted or actually utilized in a Viceroy advertisement they were excluded as not probative.

Defendants sought to call Matthew Myers, a former FTC attorney who worked on and helped write the FTC report, "to have him testify as to how he reached his conclusions" to show that the FTC report was true (Tr.

958). This testimony was refused.[2] Myers' state of mind at the time he helped to write the FTC report and the truth or falsity of the FTC report are not issues in this case; it is the truth or falsity of that part of Jacobson's broadcast found to be libelous that is an issue.

The evidence was clearly sufficient to support the jury's finding that B&W proved by a preponderance of the evidence that the broadcast statement concerning Viceroy was substantially false.[3]

C. Actual Malice

Plaintiff sought punitive as well as actual damages. Also, by virtue of its advertising and sale of cigarettes it is a public figure. *Brown & Williamson*, 713 F.2d at 273. Accordingly, B&W was required to prove "actual

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[2] The only question as to which an objection was sustained related to the organization of the FTC. Defendants waived any objection to the exclusion of any other testimony by failing to make a proper offer of proof. Fed. R. Evid. 103(a); *Ellis v. City of Chicago*, 667 F.2d 606, 612 (7th Cir. 1981). The offer of proof was to be made "by inquiring of" the witness outside the presence of the jury (Tr. 962, 963). This was not done.

[3] Defendants also argue that relief should be granted because one of plaintiff's witnesses, William Scholz, a former executive at the Ted Bates advertising agency, testified that he was not being paid by plaintiff to testify, and that he was in fact paid $4,600. Scholz testified that he would be receiving "expenses," but would not be paid anything beyond that (Tr. 309-10). When he billed plaintiff, he sought and was paid $4,600 as an "expense" to the consulting firm, Williams Communications, where he worked, because the firm lost the revenues he would have generated during those days he tesitified. While the court agrees that this use of the term "expense" may be somewhat misleading, it does not justify the relief defendants seek. Although defendants argue that Scholz's testimony was critical on the issue of falsity, there was substantial evidence apart from Scholz's testimony from which a jury could have found Jacobson's broadcast to be substantially false. Defendants have not demonstrated that plaintiff engaged in misconduct nor was Scholz's testimony so central that it would require the relief sought. *See Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832 n.3 (7th Cir. 1985).

malice" as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The jury found that plaintiff proved by clear and convincing evidence that defendants either knew the broadcast was false or recklessly disregarded whether it was false. The jury was instructed that in order to find reckless disregard of whether a statement was false there must be clear and convincing evidence to permit the conclusion that a defendant in fact entertained serious doubts as to the truth of the broadcast or was aware of its probable falsity. Consideration of this issue by a jury and the court requires careful analysis of the editorial process. *Herbert v. Lando*, 441 U.S. 153 (1979).

After reading a news report in the *Lexington (Ky.) Leader*, defendants obtained an unofficial copy of an FTC report to Congress on Cigarette Advertising. The material reviewed and referred to in the FTC report was not available to defendants because it had been kept secret by the FTC.[4] Michael Radutzky, Jacobson's researcher, contacted B&W and spoke to Thomas Humber. Humber told Radutzky that no ads of the kind referred to in the FTC report were ever published and that the MARC strategy was never adopted (Tr. 665, 473-74, 665; PX 10). He also stated that the Ted Bates Advertising Agency who had commissioned the MARC report was discharged partly because of dissatisfaction with this report. Radutzky communicated this to Jacobson (Tr. 708, 1163, 1234).

Radutzky also conducted an unsuccessful search to locate Viceroy advertising that reflected the "pot, wine, beer and sex" strategy. Radutzky stated that he specifically noted this failure to find such ads when he submitted a sample script to Jacobson (Tr. 631-32, 667-68, 691). Jacobson specifically directed Radutzky to find

[4] The FTC report itself was a secret document until released by a Congressional Committee.

such ads (Tr. 707-08). Unable to find any such ads, defendants illustrated the broadcast with, among other things, an ad showing a pack of Viceroy cigarettes next to two golf clubs and a golf ball (Tr. 708-09). The jury could have regarded defendants' failure to find any ads corroborating the "Viceroy strategy," after inquiry and active attempts to do so, as evidence either that they knew Viceroy never adopted such a strategy or as evidence which would show reckless disregard of the truth.

There was also testimony that Radutzky destroyed parts of certain relevant research and script documents. Radutzky testified he threw away that part of his copy of the FTC Staff Report with handwritten notes relating to B&W (Tr. 602), portions of his outline (Tr. 603), his copy, Jacobson's copy and several other copies of his sample script (Tr. 684), and his contemporaneous notes of interviews with people regarding Viceroy (Tr. 560-61).

The destruction of documents while a litigation is pending can be "an admission that the introduction of such evidence would be damaging to the party not producing it." *A.C. Becker Co. v. Gemex Corp.*, 314 F.2d 839, 841 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963). Radutzky's selective destruction of documents, containing substantial notes reflecting his research and thinking prior to the broadcast, could have led the jury to conclude that he knew the statements made in the broadcast were false or had doubts as to their truth.

Defendants argue that the selective document destruction evidence should not have been admitted because B&W failed to show as a preliminary matter that the destruction was in bad faith. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 550-51 (7th Cir. 1985); *S.C. Johnson & Son, Inc. v. Louisville & Nashville Railroad Co.*, 695 F.2d 253, 258-59 (7th Cir. 1982). The Seventh Circuit stated the general rule in *S.C. Johnson*:

> It is elementary that if a party has evidence . . . in its control and fails to produce it, an inference may be warranted that the document would have been unfavorable. *However . . . it must appear that the party had some reason to suppose that nonproduction would justify the inference . . . the totality of the circumstances must bring home to the nonproducing party notice that the inference may be drawn.*

695 F.2d at 259 (quoting *Commercial Insurance Co. of Newark v. Gonzalez*, 512 F.2d 1307, 1314 (1st Cir.), *cert. denied*, 423 U.S. 838 (1975) (emphasis added by Seventh Circuit)). Thus the "totality of the circumstances" must demonstrate that Radutzky destroyed his notes and other documents in bad faith.

Radutzky knew that the present case had been brought against CBS and Jacobson. He learned of the lawsuit in March, 1982, shortly after it was filed. CBS had a retention policy that provided:

> Once the station is notified of a claim pertaining to any of the following material, the litigation section of the Law Department should be notified and any and all related materials should be retained until specifically released.
>
> Some materials are retained indefinitely on a selected basis. Our policy is to review the files in January to determine what should be selectively retained. Obviously if there is a . . . pending legal action, our policy is to retain all pertinent materials unless specifically released by the Law Department.

Radutzky testified that he was kept informed about the case by lawyers (Tr. 558) and that he only destroyed the documents when he heard that the case was dismissed (Tr. 623); that he did not know that the dismissal was being appealed (Tr. 624); and that he was only housecleaning when he threw those documents away (Tr. 758-59).

However, Radutzky admitted he was not given permission by the CBS attorneys to destroy documents (Tr. 560). The notice of appeal from the dismissal was filed only six days after the motion to dismiss was granted. Although Radutzky denied knowing about CBS's retention policy, his emphasis on destroying the documents only after learning of the dismissal would indicate he understood that documents should not be destroyed while litigation is pending.

Radutzky testified he "gathered up the notes that [he] had taken on the cigarette series as well as a bunch of other notes . . . and [he] used that opportunity to just clean house, as it were, and relieve overflowing files." (Tr. 758-59). This explanation implies a wholesale, nonselective process. But only part of the copy of the FTC report with Radutzky's handwritten notes in the margins was destroyed—the first five of ten pages were destroyed and the others were not (Tr. 586-87, 591).

Radutzky made an original and six or seven copies of his "sample script," one of the documents destroyed, and distributed them to Jacobson and other CBS executives (Tr. 685-86). Yet not one of these copies could be found, and Radutzky did not claim to destroy documents in the possession of anyone other than Jacobson and himself.

The jury could reasonably find, based on the totality of the circumstances, that Radutzky's destruction of documents was in bad faith, justifying an inference that the documents were damaging to defendants' case. The jury could conclude that the contents of these documents would indicate serious doubt, or more, on the part of Radutzky, as to the truth of the broadcast.[5]

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[5] Plaintiff's proposed instruction on the implication of document destruction was refused. Rather the matter was one for argument by the parties to the jury.

There was also evidence submitted that the broadcasts at issue were aired during a "sweeps" period, a period when the number of viewers watching different television stations is monitored. The ratings obtained during sweeps were important to CBS and WBBM (Tr. 814, 1041, 1045-49; PX 30). There was evidence that defendants wanted exciting news stories during the sweeps period (PX 16). A jury could reasonably infer that the timing of the broadcast during "sweeps week" might give defendants a stronger motive to air this broadcast, even if they had doubts about its content. The importance of "sweeps week" was a relevant part of the editorial process proof.

Defendants' evidence on the issue of actual malice consisted of the testimony of Jacobson and Radutzky as to their state of mind at the time of the broadcast. They testified that they believed the statements made to be true and that they did not have doubts as to that truth. However, there were instances of inconsistency in their testimony that posed questions of credibility for the jury. For example, Jacobson, testifying that he remembered specific details surrounding his writing of the Perspective script at issue, directly contradicted his earlier deposition testimony that he had no memory of the matter (Tr. 1280-1299).

There is also the following testimony by Jacobson in response to a question by defendants' attorney:

> Q When you sat down to write this Perspective, and then when you got on the air and delivered it, did you intend to inform your viewers that Viceroy was actually running advertising that contained pot, wine, beer and sex?
>
> A No, no way, I didn't say it. I didn't think it.
>
> I was reporting on the Federal Government report. I took quotes from the report. And I

> put the quotes on the air. And I was not making a statement whatsoever about advertisements, certain advertisements that might have been implemented. I was simply saying what the report said, that this was a Viceroy strategy, that this strategy might have been there for ten years, 20 years, two years, or whatever.

(Tr. 1246-47).

B&W contends that this statement constituted an admission by Jacobson that he knew at the time of the broadcast that B&W never ran any advertisements related to pot, wine, beer, and sex and therefore an admission of actual malice. Defendants argue that this statement is not an admission of actual malice because Jacobson never said in the broadcast that Viceroy ran any such advertisements; all Jacobson said in the broadcast, they contend, was that Viceroy had "a strategy." Furthermore, defendants argue that even if the broadcast could have been interpreted as a statement about "pot, wine, beer, and sex" advertisements, his testimony reveals that this was an unintended interpretation reflecting at most the inadvertent choice of misleading language, and actually proves that Jacobson lacked the requisite knowledge that his statements were false.

However, the jury could have rejected Jacobson's testimony that he did not intend to communicate a message about actual Viceroy advertising. The theme of the broadcast was cigarette advertising. The statements made in the broadcast relating to the "Viceroy strategy" were made in the context of explaining why so many children take up smoking. The statement was made by Jacobson that television advertising of cigarettes is off limits; so the "killer business has gone to Madison Avenue with a billion dollars a year for bigger and better ways to sell cigarettes." Just prior to describing "the Viceroy strategy," Jacobson stated in the broadcast:

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children, that if children are smoking, which they are, more than ever before, it's not the fault of the cigarette business. "Who knows whose fault it is?" says the cigarette business. "Who knows whose fault it is that children are smoking? It's not ours."

713 F.2d at 266 (reciting the broadcast). Jacobson immediately goes on to describe "a Viceroy *advertising*, the Viceroy strategy for attracting young people, starters they are called, to smoking." The reference to "Viceroy advertising" and "the Viceroy strategy" at that point can be understood as demonstrating how and why children begin smoking, and that it was Viceroy's fault (at least as one advertiser).

A "strategy" that was not implemented, that was nothing more than a report in a drawer, could not explain why children smoke. Only advertising that children see can persuade them of anything. Jacobson finished his broadcast:

> An attempt should be made, says the Viceroy slicksters, "TO RELATE THE CIGARETTE TO 'POT,' WINE, BEER, SEX. DO NOT COMMUNICATE HEALTH OR HEALTH-RELATED POINTS." That's the strategy of the cigarette slicksters, the cigarette business which is insisting in public, "We are not selling cigarettes to children."
>
> They're not slicksters, they're liars.

Id. Jacobson stated that the cigarette companies were liars because they were in fact selling cigarettes to children. And the clear message is that Viceroy was doing this through the use of its advertising that relates the cigarette to pot, wine, beer, and sex.

In its opinion in this case, the Seventh Circuit found the broadcast to be libelous per se and described the mes-

sage of the broadcast to be that of "[a]ccusing a cigarette company of what many people consider the immoral strategy of enticing children to smoke—enticing them *by advertising* that employs themes exploitive of adolescent vulnerability . . ." 713 F.2d at 268 (emphasis added). Elsewhere in the opinion the Seventh Circuit summarized the broadcast:

> The Jacobson broadcast conveys the following message: Brown & Williamson *currently is advertising cigarettes* in a manner designed to entice children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures of youth."

Id. at 271 (emphasis added). The broadcast could be interpreted by any average viewer/listener [the jury] just as the Seventh Circuit describes it—as describing actual Viceroy advertising relating cigarettes to various "illicit pleasures."

Defendants argue that even if the broadcast can be interpreted that way, that interpretation was unintended by Jacobson, and Jacobsons' belief that it would be understood as referring only to a "paper strategy" and not actual advertising demonstrates the absence of actual malice, citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). In *Bose*, the defendant published an article evaluating several brands of loudspeakers, including one marketed by the plaintiff. The article included the statement: "Worse, individual instruments heard through the *Bose* system . . . tended to wander about the room." 466 U.S. at 488. The district court found that this was a false statement of fact because instruments heard through the speakers tended to wander "along the wall" rather than "about the room." It also found that defendant had published this false statement with actual malice based on the state of mind of the engineers who supervised the test and wrote the report.

The Supreme Court, affirming the First Circuit's reversal of the district court, held that actual malice had not been demonstrated by clear and convincing evidence. The Court stated:

> [A]doption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. . . . The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella.

466 U.S. at 512-13.

This case, however, is factually quite different from *Bose*. Unlike the "malapropism" involved in *Bose*, the statement made by Jacobson is a powerful statement indicting the cigarette industry and Viceroy in particular. It communicates the message that Viceroy was using actual advertisements to hook children on cigarettes.

The evidence was such that the jury could have found it incredible that Jacobson gave this impression inadvertently. Jacobson is a veteran newsman and commentator who writes hundreds of "Perspective" scripts each year. The impression given by Jacobson is not the result of one word, as it was in *Bose*, involving the relatively subtle distinction between "about" and "along"; it is the result of the cumulative effect of the entire broadcast. The entire broadcast dealt with methods *actually used* by the cigarettte industry to entice children to smoking, such as advertising in popular movies and distributing cigarettes on the street. The visual portion of the broadcast included pictures of cigarettes being distributed to young people on the street. Defendants admitted that this footage was taken from its archives and that Viceroy cigarettes were not being distributed. Since the evidence does not support a conclusion that Jacobson inadvertently sent the message that B&W was actually using

such ads, Jacobson's testimony that he did not think at the time he wrote the Perspective that B&W was running such ads constitutes an admission on the issue of actual doubt or reckless disregard of the falsity of the broadcast.

Based on a review of the record, there was clear and convincing evidence to support the jury's finding that defendants published a libelous statement with actual malice.

Defendants also object to certain rulings regarding evidence and to certain of the court's jury instructions on the issue of actual malice, as follows:

(1) Defendants argue that the term "reckless disregard" should not have been used to instruct the jury on the required state of mind because it suggests an objective rather than a subjective standard. However, the court instructed the jury:

> In order to find a defendant recklessly disregarded whether a statement was false, there must be clear and convincing evidence to permit the conclusion that a defendant *in fact entertained serious doubts* as to the truth of the broadcast or was aware of its probable falsity. Broadcasting *with such doubts or awareness* shows reckless disregard of falsity.

(Tr. 1573 (emphasis added)). This instruction clearly employs a subjective standard consistent with *St. Amant v. Thompson*, 390 U.S. 727 (1968), and in fact tracks the language of that case. *Id.* at 731.

(2) Defendants argue that the court should have instructed the jury on the meaning of the words "clear and convincing" as used in setting the quantum of proof required to establish actual malice. The comments appended to the Illinois Pattern Jury Instructions discourage such elaborations and this court, sitting in diversity, follows that direction. *See Illinois Pattern Jury Instruc-*

tions, Comments to No. 21.01 and 21.06 (2d ed. 1971). Similarly, the Seventh Circuit has wisely cautioned against defining terms such as "reasonable doubt." *See* Federal Criminal Jury Instructions of the Seventh Circuit, No. 2.07 (and cases cited therein) (1980). Just as the Seventh Circuit Committee found the phrase "reasonable doubt" to be self-explanatory and its own best definition, so too the words "clear and convincing" are self-explanatory and need no further explanation.

(3) Defendants argue that it was error to admit evidence of the CBS news standards. It was initially ruled that advisory standards were inadmissible as not directly related to defendants' actions with regard to the particular broadcast at issue. At trial, however, defendants' examination of a CBS witness on the subject of his opinion of the fairness and accuracy of the Perspective opened the door for this evidence. Defendants pursued this line of questioning despite warnings that such testimony would subject him to cross-examination concerning CBS standards which in a deposition he admitted were violated by the Jacobson broadcast (Tr. 980-81, 1004-06, 1012, 1027-29). Because defendants presented opinion evidence of the general fairness of the Perspective, plaintiff was entitled to attempt to show that the Perspective violated certain CBS standards as the witness had stated in a deposition.

(4) Defendants argue that they were erroneously prevented from introducing evidence regarding research done concerning other parts of the Perspective not involving Viceroy advertising in order to show how carefully the defendants put the Perspective together. Defendants argued during trial that they should be entitled to show that they carefully researched the other segments of Perspective, involving Merit and Marlboro cigarettes, since the entire Perspective was shown to the jury (Tr. 1111-1116). But plaintiff was prepared to stipulate that there were no issues as to those other segments of the

Perspective (Tr. 1116-17). Therefore defendants' actions with regard to those other segments were not at issue. That evidence was not relevant to the issues in the case and would have protracted the already complicated trial.

(5) Defendants argue that evidence relating to the so-called "sweeps" period,[6] including PX 16 (indicating certain desirable common denominators of pieces to be run during sweeps), and PX 17 and 18 (the ads advertising the Jacobson Perspective on cigarette advertising) was irrelevant. Even if that evidence showed defendants had a heightened desire at that time for dramatic subject matter that would produce a larger viewership, higher ratings, and, thereby, increased advertising revenues, argue defendants, that does not evidence a lessened concern for the truth. But it is possible that if defendants anticipated a heightened benefit from the broadcast due to sweeps, they would be more likely to run that story in spite of doubts about the truth of the story and despite the *same* level of concern for the truth. As stated in *Herbert v. Lando, supra,* 441 U.S. at 165, "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant. . . ." As evidence of a strong motive—independent of truth—to broadcast, the "sweeps" evidence was relevant to defendants' state of mind.

Defendants also argue that the "sweeps" denominators lacked proper authentication and should have been excluded for that reason as well. Federal Rule of Evidence 901(a) states that "[t]he requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the mat-

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[6] At certain periods of the year, including the time of the Jacobson broadcast, surveys are made of the number of program viewers. The CBS news program was number one in the survey, relative to other news shows.

ter in question is what its proponents claim." PX 16 was produced by defendants from their files and dealt with a subject familiar to CBS employees and specifically relevant to the broadcast period. This was sufficient. *Burgess v. Premier Corp.*, 727 F.2d 826, 835 (9th Cir. 1984).

D. *Fair Summary*

The jury found that defendants did not prove by a preponderance of the evidence that the broadcast was a "fair summary" of portions of the Federal Trade Commission's Staff Report on the cigarette advertising investigation. Defendants now ask the court to set aside the jury's finding. But there is no basis for granting either judgment n.o.v. or a new trial on this issue.

First, the Seventh Circuit addressed this issue of fair summary and stated:

> The FTC staff report conveys the following message: six years ago a market-research firm submitted to Brown & Williamson a set of rather lurid proposals for enticing young people to smoke cigarettes and Brown & Williamson adopted many of its ideas (though not necessarily the specific proposals quoted in the report) in an advertising campaign aimed at young smokers which it conducted the following year. The Jacobson broadcast conveys the following message: Brown & Williamson currently is advertising cigarettes in a manner designed to entice children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures of youth. So at least a rational jury might interpret the source and the summary, and if it did it would be entitled to conclude that the summary carried a greater sting and was therefore unfair.

713 F.2d at 271-72. The Seventh Circuit plainly held that the issue of fair summary was for the jury. This court will not disturb that holding.

Defendants argue that this court is not bound by the Seventh Circuit's opinion on this issue because it was rendered in the context of an appeal from the granting of a motion to dismiss and was not based on the fully developed record presented at trial. That is true, but it makes no difference. The Seventh Circuit held the issue was for the jury by looking solely at the face of the FTC report and the words of Jacobson's broadcast. Neither of those have changed between then and now.

Even if this court were not bound by the Seventh Circuit's opinion, there is no basis for disturbing the jury's finding. As the Seventh Circuit's opinion shows, the most important evidence in deciding this question are six pages from the FTC report and the broadcast itself.[7] The Seventh Circuit's analysis reflected a comparison of these documents; little else was brought out at trial on this issue that would affect such an analysis. "An unfair summary . . . is one that amplifies the libelous effect that publications of the government report verbatim would have on a reader who read it carefully—that carries a 'greater sting.' ". *Brown & Williamson*, 713 F.2d at 271 (quoting *Tunney v. American Broadcasting Co.*, 109 Ill.App.3d 769, 776, 65 Ill.Dec. 294, 298, 441 N.E.2d 86, 80 (1st Dist. 1982)). There are several differences between the FTC report and the broadcast that would allow a jury to find that the one was not a fair summary of the other. These include:

1. The broadcast used the present tense to represent that the tactics were currently being used while the FTC staff report indicated that the quoted language came from a report written six years earlier.

2. The broadcast implied that the quotations from the MARC report came directly from B&W while the FTC staff report clearly indicated that they were

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[7] The six pages from the FTC report are attached as Appendix A to this opinion.

from the MARC report made to an advertising agency.

3. The broadcast used the terms "children" to refer to the object of this strategy, while the report used the terms "young smokers" and "starters."

4. The report did not cite any published Viceroy advertisement that implemented a pot, wine, beer or sex strategy to attract children to smoke cigarettes. The broadcast clearly implied such ads existed.

Based on these changes by defendants, a rational jury could find that the broadcast had a "greater sting" than the FTC staff report.

Defendants also argue that other newspaper articles viewed by Radutzky that discussed the FTC staff report should have been admitted on the issue of fair summary. The jury was instructed that they could consider those documents as evidence on the issue of actual malice but not on the issue of fair summary (Tr. 1574-75). Defendants argue that these articles would serve as the "appropriate measure" by which the jury could "distinguish the heightened 'defamatory sting' that alone can defeat the fair summary privilege from the heightened impact inherent in a summary." (Defendants' Memorandum in Support at 56). But defendants' argument is premised on incorrect assumptions about both the test to be applied and the nature of the evidence they would have the jury consider. To determine whether the broadcast was a fair summary or not, the jury was required to determine whether the broadcast carried a "greater sting" than the FTC staff report. 713 F.2d at 271. The term "greater" implies a comparison—a direct comparison—between the two statements. It does not, moreover, require some minimum, quantifiable degree of "incremental sting." Defendants' argument implies that some degree of heightened defamatory sting—presumably the heightened sting contained in the newspaper articles—is toler-

ated by the test and is consistent with a "fair summary." The test does not support this interpretation. The test does not require the jury to "measure" the greater sting and compare that quantity to some objective standard. To do so would be not only inconsistent with the test, but would be impractical and confusing.

Defendants' argument also presumes that the newspaper articles that defendants would have had the jury consider are themselves fair summaries but that was not self-evident. That issue was not before the court and was never decided. There is no reason to assume that a jury, when faced with the issue, might not find the newspaper articles to carry the requisite "greater sting" and to be "unfair." This problem also points up the impracticality of defendants' proposed interpretation of the test —where does one find a measure of "acceptable" heightened "sting" or "impact," and how many trials-within-the-trial will be needed to establish that minimum? The newspaper articles were properly excluded on the issue of fair summary.

Defendants also argue the jury should have been instructed that plaintiffs had to prove by clear and convincing evidence that defendants either knew their summarization was unfair or seriously doubted its fairness. Defendants would thereby add the element of actual malice as applied to the process of summarization and would place the burden of proving that the summary was not fair on the plaintiff.[8] Defendants cite no cases in support of this theory. They rely only on language from Restatement (Second) of Torts § 611 comment b (1977),

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[8] This issue is, of course, distinct from the question of whether the issue of fair summary survives a finding of actual malice *as to the falsity of the statement itself*. That issue was addressed by the Seventh Circuit but left undecided. 713 F.2d at 272-73. It is now moot since the jury found that the defendants did not prove that the broadcast was a fair summary.

which they contend supports their argument.[9] Defendants contend that the Illinois Supreme Court adopted § 611 in *Catalano v. Pechous*, 83 Ill.2d 146, 50 Ill.Dec. 242, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981). However, although the court in *Catalano* discussed § 611 and comment a, it could hardly be said to have adopted comment b. *See Brown & Williamson*, 713 F.2d at 272 (observing that although § 611 implied the fair summary privilege was not forfeited by actual malice as to the truth or falsity of the statements, *Catalano* appeared to have treated the question as open). Moreover, the issue of fault or burden of proof regarding the summarization process was not discussed at all in *Catalano*, and it is incorrect to assert that the Illinois Supreme Court, by discussing § 611 as to one aspect of the privilege, adopted it as to all aspects and issues touched on by the comments to that section. The privilege of fair summary is an affirmative defense which a defendant must prove by a preponderance of the evidence. *Welch v. Chicago Tribune Co.*, 34 Ill.App.3d 1046, 340 N.E.2d 539, 543 (1st Dist. 1976); *Fleck Bros. Co. v. Sullivan*, 423 F.2d 155, 157 (7th Cir. 1970); Restatement (Second) of Torts § 613(2).

Recent cases dealing with the Illinois fair summary privilege establish an objective test under which the priv-

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[9] Comment b states, in part:

> The privilege stated in this Section [to report on official proceedings or public meetings] permits a person to publish a report of an official action or proceeding or of a public meeting that deals with a matter of public concern, even though the report contains what he knows to be a false and defamatory statement. The constitutional requirement of fault is met in this situation by a showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgement. The distinction as to the measure of fault [as between cases involving public figure plaintiffs and cases involving private person plaintiffs] is applicable to the requirement of fault for this purpose, too.

ilege is forfeited if it is inaccurate or unfair—if it contains a "greater sting" than the report on which it is based. *Brown & Williamson*, 713 F.2d at 271; *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 535 n.12 (7th Cir. 1982). Defendants' additional proposed malice requirement (which they would cast on the plaintiff) was expressly rejected by the Illinois Appellate Court. *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, 47 Ill.Dec. 429, 441-42, 415 N.E.2d 434, 448-49 (1st Dist. 1980).

The privilege of fair and accurate summary of government proceedings and reports is grounded in the common law and is not based on the First Amendment. *Brown & Williamson*, 713 F.2d at 270. Defendants have not argued otherwise. It is inconsistent to argue that the First Amendment requires a higher test to defeat a privilege not required by the Constitution in the first place. A summary that objectively carries a "greater sting" than the report it summarizes loses the protection of this privilege under Illinois law. It is not required that *plaintiff* prove defendants knew their broadcast was unfair or inaccurate or that they seriously doubted its fairness and accuracy. The burden is rather on the defendants to prove that they made a fair summary in order to invoke the privilege. The jury's determination that defendants failed to prove the defense of fair summary cannot be set aside.

E. Opinion

This court ruled prior to trial that the last sentence of the broadcast—"They're not slicksters, they're liars" —is a statement of fact and not a statement of protected opinion. *Brown & Williamson v. Jacobson*, No. 82 C 1648, slip op. (N.D. Ill. March 14, 1985) (denying defendants' motion for summary judgment). Defendants now argue (1) that the ruling of March 14, 1985 was incorrect and (2) that it was erroneously "extended" to apply to the rest of the broadcast "without giving de-

fendants an opportunity to be heard on the issue." (Defendants' Memorandum in Support at 27).

1. "They're not slicksters, they're liars."

The distinction between fact and opinion is a matter of law. *E.g., Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985) To determine whether a statement is fact or opinion, a court must evaluate the totality of the circumstances and should consider these factors:

(1) Whether the statement has a precise core of meaning for which a consensus of understanding exists, or whether the statement is indefinite and ambiguous.

(2) Whether the statement is capable of objective verification as true or false.

(3) Considering the full context of the statement (the entire broadcast), will the average person infer that the particular statement has a factual context? Was cautionary or opinion wording used?

(4) Does the broader context or setting in which the statement appears signal the likelihood of the statements being either fact or opinion?

Ollman, 750 F.2d at 979.

Examined according to these criteria, the statement—"They're not slicksters, they're liars"—is a statement of fact and not opinion. The assertion that B&W is a "liar" has a precise core of meaning; it meant that B&W falsely denied using the kind of advertising described in Jacobson's broadcast. The statement is capable of objective verification; by determining whether B&W did use such advertising or not, one could also determine whether it lied when it denied doing so. In the context of the entire broadcast, the average person would infer that the state-

ment had a factual context; Jacobson used the rest of the broadcast to purportedly explain to the public how B&W and other cigarette manufacturers did in fact advertise to attract children.

By presenting the rest of the broadcast as essentially factual material, the average person would infer that the statement accusing B&W of lying had a factual context. No cautionary or opinion wording was used. The only factor arguably favoring defendants' position is the last one—Jacobson did shift to the "Perspective corner" in order to make this broadcast. The precise nature of a "Perspective" is still far from clear. It is not, however, an "editorial" that is said to "reflect the views of the station" or of Jacobson. When considered together with the other factors, the totality of the circumstances demonstrates that Jacobson's concluding statement was one of fact and not opinion. *See also Costello v. Capital Cities Media, Inc.*, 111 Ill.App.3d 1009, 67 Ill.Dec. 721, 726, 445 N.E.2d 13, 18 (5th Dist. 1982) (accusing someone of being a liar is a factual assertion "when the derogatory remark is laden with factual content"); *Buckley v. Littell*, 539 F.2d 882, 895-96 (2d Cir. 1976); *cert. denied*, 429 U.S. 1062 (1977).

Defendants' statement that plaintiff is a "liar" is distinguished from the insulting terms found to be opinion in *Spelson v. CBS, Inc.*, 581 F. Supp. 1195 (N.D. Ill. 1984), *aff'd without published opinion*, 757 F.2d 1291 (7th Cir. 1985), for the same reasons that make defendants' statement one of fact in the first place. Unlike the accusation that one has lied about a particular, verifiable matter, terms like "quack," "unethical," "unprofessional," "inhuman," or "totally worthless," do not have "a precise core of meaning for which a consensus of understanding exists." They are not "capable of objective verification as true or false." Defendants misapprehend the issue when they argue that defendants' statement is opinion because the terms "slicksters" and "liars" are

"tame by comparison" to the terms in *Spelson*. The determination does not depend on the degree to which the statement insults. *See Ollman, supra*, 750 F.2d at 980 ("A classic example of a statement with a well-defined meaning is an accusation of a crime.").

Defendants also argue the Illinois "innocent construction rule" required the jury to decide the fact/opinion issue. Plaintiff disagrees, but this court need not decide whether the innocent construction rule applies, as a matter of Illinois law, to the opinion/fact issue. It is well established that a federal trial court follows the federal rule, when it differs from the state rule, as to whether the court or the jury decides a particular issue. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 533-40 (1958); *Herron v. Southern Pacific Co.*, 283 U.S. 91, 94-96 (1930). This is true whether the federal rule requires that an issue be decided by the court (*Herron*) or the jury (*Byrd*).

The federal rule requires the court to decide, as a matter of law, whether a statement is one of fact or opinion. *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985); *Ollman, supra*, at 978;[10] *Lauerback v. American Broadcasting Cos.*, 741 F.2d 193, 196 n.6 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 961 (1985); *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983); *Rinsley v. Brandt*, 700 F.2d 1304, 1309 (10th Cir. 1983). Therefore, even assuming that an Illinois state court would have submitted the opinion/fact question to the jury,[11] this court properly decided the question as one of law.

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[10] Defendants point to footnote 18 in *Ollman* as if to suggest that *Ollman* recognizes an exception to this rule. But footnote 18 addresses the difference between *what* its test does and *what* the Illinois innocent construction rule does, and not *when* each is to be applied.

[11] Even under the Illinois "innocent construction rule," this statement would be found to be a statement of fact by the court.

[Continued]

2. Treatment of Opinion Ruling at Trial

Defendants also argue that the court erred by "extending its holding" that the last statement in the broadcast was factual to the entire broadcast. Defendants' argument is based on an exchange that took place while counsel for defendants was examining Jacobson. Jacobson had just described how he had left his desk as an anchorman on the night of the broadcast and had gone to the "Perspective corner" to give the "Perspective" on cigarette advertising, and how there were "clear definitions" between the "Perspective" and the "news" (Tr. 1221-22). Then the following exchange took place:

> MR. LONDON [plaintiff's counsel]: Your Honor, I move to strike the answer. It is full of material about why he did it, about dividing lines so that he could go to this corner, about commentary and opinion. The question was what he did and not why he did it. The whole question of opinion has been ruled out of this case. I respectfully request that the answer be stricken and the witness be again asked to please answer only the question asked so that we will not have inadmissible material coming before the jury.
>
> THE WITNESS: I am answering the question, sir, I was asked.
>
> THE COURT: Sir, please.
>
> MR. MORSCH [defendants' counsel]: Your honor, could I make just one short response to that?
>
> THE COURT: Yes.
>
> MR. MORSCH: The question of opinion has not been ruled out of the case.

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[11] [Continued]

The innocent construction rule, if it applied at all, would require submitting the question to the jury only if a court first found, as a matter of law, that the statement could "reasonably be interpreted" as a statement of opinion. *Chapski v. Copley Press*, 92 Ill.2d 344, 352, 65 Ill. Dec. 884, 888, 442 N.E.2d 195, 199 (1982). Jacobson's final sentence cannot reasonably be so interpreted.

> THE COURT: Sir, I beg to differ with you. I have ruled that it is not a matter of opinion, and I must now tell the jury that I have so ruled, that the issues in this case are fact not opinion. Otherwise, the objection is overruled. The answer may stand.

(Tr. 1223). Morsch then proceeded to question Jacobson on the use of a "teleprompter" and no further discussion was had on the issue of opinion at that time.

Defendants now argue that by its response to Morsch, the court "extended" its holding as to opinion from the last statement in the broadcast—"they're not slicksters, they're liars—to the entire broadcast. The suggestion by defendants during trial that opinion was still an issue in the case was a surprise. To understand why requires a review of some of the proceedings. On January 4, 1985, defendants moved for summary judgment, arguing (1) that there was no genuine issue as to actual malice and (2) that defendants' last statement was opinion and therefore absolutely protected under the First Amendment. Defendants clearly limited their opinion argument to the final sentence of the broadcast. Since any statements found to be opinion would be privileged, defendant's decision to argue opinion only as to the last sentence of the broadcast clearly implied that they conceded the rest of the broadcast to be statements of fact. Defendants filed their trial brief on January 22, 1985, in which they discussed each of their defenses in turn. The discussion of the opinion defense consisted of the following paragraph:

> The Cigarette Advertising Perspective contains both statement of facts and statements of opinion. The statements of fact contained in the Perspective are privileged as a fair summary of the FTC Staff Report [citing to another section of the trial brief]. To the extent that defendants' statements—even if viewed as provocative, controversial, or unfair—were

> statements of opinion based on facts disclosed in the broadcast, they too are absolutely privileged. *See* Defendants' Motion for Summary Judgment.

Thus defendants' trial brief reinforces the implication in their motion for summary judgment that they conceded the rest of the broadcast (other than the last sentence) to be statements of fact. The trial brief referred the court to their motion for summary judgment on the issue of opinion, which in turn limited the argument on opinion to Jacobson's final sentence. When the court ruled on March 14, 1985 that the final sentence was a statement of fact and not of opinion, it believed it had ruled on any opinion contention in this case. Therefore, when counsel for defendants stated on the eighth day of trial that "[t]he question of opinion has not been ruled out of the case," the court disagreed.

Defendants' failure to argue in their January, 1985 motion for summary judgment that other parts of the broadcast were opinion arguably would not preclude them from raising such an issue to the court at a later date if it had been preserved in the final pretrial order or defendants' trial brief. It was not.[12]

Defendants' argument that the court's statement at trial regarding opinion prejudiced them and somehow requires granting the relief they seek in these post-trial motions fails for two additional reasons. First, as already discussed, the question of whether a statement is of fact or opinion is one of law. Therefore the defendants would in no event have been able to submit the issue of opinion to the jury. Second, defendants' motion is for judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b) and, alternatively, for a new trial

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[12] In their summary judgment memorandum, page 38, defendants stated that "[t]he question whether a given statement is a factual assertion or a protected opinion is one of law to be decided by the Court."

pursuant to Fed. R. Civ. P. 59. Defendants failed to preserve the issue of opinion under either Rule 50(b) or Rule 59.

Since a motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for a directed verdict. *E.g., Kinzenbaw v. Deere & Co.*, 741 F.2d 383, 387 (Fed. Cir. 1984), *cert. denied*, 105 S.Ct. 1357 (1985); *Ebker v. Tan Jay Int'l, Ltd*, 739 F.2d 812, 814 (2d Cir. 1984). Defendants did move for a directed verdict on liability, both at the end of the plaintiff's evidence and at the conclusion of all the evidence on liability. On neither of these occasions did defendants raise the issue of opinion.

Defendants also move, in the alternative, for a new trial. A party may not seek a new trial on the basis of a theory not urged at the trial. *E.g., Grumman Aircraft Engineering Corp v. Renegotiation Board*, 482 F.2d 710, 721 (D.C. Cir. 1973); *reversed on other grounds*, 421 U.S. 168 (1975); *Echevarria v. United States Steel Corp*, 392 F.2d 885, 892 (7th Cir. 1968); *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976). Defendants never properly raised the issue of opinion at trial.

Even now, in their motion for judgment notwithstanding the verdict, defendants do not indicate precisely what parts of the broadcast are opinion and what parts are fact.[13] Defendants did not preserve any unresolved issue of opinion for consideration in their motion for judgment notwithstanding the verdict or motion for a new trial.

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[13] Defendants suggest that particular "*phrases like* 'the killer business,' 'the slicksters on Madison Avenue,' 'go to the youth of America,' and 'the Viceroy slicksters' were expressions of Mr. Jacobson's opinion." Defendants' Memorandum in Support at 32-33 (emphasis added). But they do not make it clear *exactly* what parts of the broadcast they contend are opinion.

Even if defendants had preserved that issue, the other part of the broadcast relating to plaintiff were statments of fact. In summarizing the relevant part of the broadcast, the Seventh Circuit found that it conveyed the following message:

> Brown & Williamson currently is advertising cigarettes in a manner designed to entice children to smoke by associating smoking with drinking, sex, marijuana, and other illicit pleasures of youth.

713 F.2d at 271. The relevant part of the broadcast is factual in nature—it describes *what B&W is doing.*

F. Closing Arguments

Defendants complain of plaintiff's use of some of the rhetoric from the broadcast in its closing argument. If defendants had wanted these phrases excised from the proceedings, they should at some time have asked the court to do so. They never did.

Defendants contend that plaintiff improperly argued that parts of the broadcast referred to plaintiff when they did not and improperly personalized the remarks. However, "[i]n the absence of objection and the giving to the trial court an opportunity to attempt to correct any harm by a curative instruction, [it is] assumed that the jury had the ability to separate inflammatory and emotional rhetoric from the relevant facts in the case." *Gonzalez v. Volvo of America Corp.*, 752 F.2d 295, 298 (7th Cir. 1985).

G. Instruction on "Corporate Defamation"

Defendants argue that the court improperly refused defendants' proposed instruction to the effect that plaintiff could recover only for defamatory statements accusing it of fraud, mismanagement, or financial instability. In its opinion in this case, the Seventh Circuit addressed

that argument and held that no such limitation existed under Illinois law. The court stated:

> [T]his court's statement in *Continental Nut* that the plaintiff had to show "fraud, mismanagement, or financial instability" was an effort to summarize the types of defamation to which corporations are susceptible, rather than an assertion, without any basis in Illinois law, that corporations are disfavored plaintiffs in defamation cases. A corporation . . . can have a reputation for adhering to the moral standards of the community in which it sells its products and if that reputation is assailed in a fashion likely to harm the corporation seriously, the corporation has been libeled under Illinois law.

713 F.2d at 269. This court is bound by that holding.

II. Damages

After a separate trial on damages, the jury awarded plaintiff three million dollars in compensatory damages, two million dollars in punitive damages against CBS and fifty thousand dollars in punitive damages against Jacobson. Defendants move for judgment notwithstanding the verdict, a new trial on damages, or a remittitur, on the grounds that the damage award was wholly unsupported by the evidence and the result of passion and prejudice.

A. Compensatory Damages

B&W alleged in its complaint that it had been injured as a result of the tendency of defendants' statements to undermine its "reputation for honesty and to decrease its sales" and to destroy the "value of its investment in Viceroy advertising between 1978 and 1981." Plaintiff sought "actual damages in an amount to be proved at trial," punitive damages, and a declaration that the statements made were false.

Defendants argue that there was no proof of any actual injury to plaintiff, such as would justify an award of substantial compensatory damages. Plaintiff's evidence during the damages phase of the trial consisted of the following:

(1) B&W's general counsel testified that after the broadcast there were calls from the field sales force indicating that their contacts were asking "how in the world could Brown & Williamson have done such a thing."

(2) A department sales manager for B&W in the Chicago area, testified that after the broadcast he received calls from sales managers in the Chicago area reporting that they had received negative comments from distributors, retailers and consumers. He testified that the sales staff was disrupted by questions from retailers and consumers. He could not testify as to how much time was lost. He testified that some sales employees were very concerned about the company's reputation, but he was unaware of anyone who resigned. He could not testify to any lost sales.

(3) A representative of a cigarette distributor in the Chicago area testified that he spoke with persons in the tobacco industry who told him that the broadcast would not be helpful to the industry. He could not testify, however, that the sale of Viceroys suffered as a result of the broadcast, or that his own distributorship lost a single customer.

(4) The former vice-president of marketing and senior vice-president of B&W testified that his son saw the broadcast and reported it to him by phone and that he was personally distressed by the report. He stated that B&W had a reputation that it cared about, because its employees and their friends and families care about what kind of company they work for, and because its customers care about the reputation of the company from which

they buy their cigarettes. He also testified that B&W's reputation among government entities and among its suppliers and creditors is important.

He acknowledged that the FTC staff report involved in this case had criticized B&W several years before the broadcast for some of its advertising practices and this hurt B&W's reputation. He also testified that B&W kept records that would show the increase or decrease in sales in any particular product, such as Viceroy, at a particular time in a particular market, such as the Chicago metropolitan area, but that no one was aware of a decline in the sale of Viceroy or other B&W products.

(5) Plaintiff called a professor of journalism to sponsor an advertising agency's estimate of the cost of a campaign through the television viewing area designed to correct the effects of the Jacobson broadcast. Although the witness was prepared to testify that the cost estimates appeared to be reasonable, he had no part in the preparation of the report. Moreover, the report was prepared before the jury's liability verdict was given publicity and the witness was not prepared to say whether such a campaign was appropriate after the wide publicity given the jury's verdict on liability. This testimony and report, which would have supported a damage claim of approximately $850,000, was refused.

(6) The only other evidence of damages was proof of the repetition of the Jacobson broadcast in an edition of the *Saturday Evening Post*. No evidence was offered concerning the effect of this republication, but in final argument counsel for plaintiff suggested that the number of issues in which republication appeared supported a claim for several million dollars.

There was no evidence that Viceroy lost sales, lost a distributor, lost profits, or had an employee quit or stop working as effectively and enthusiastically as he used to, or that any individual stopped smoking Viceroys or any

other B&W product, or that the company experienced any additional difficulty in dealing with any government entity, any creditor, or any supplier. No evidence was offered as to B&W's investment in Viceroy advertising during the period 1978 to 1981, nor was any attempt made to show that the value of Viceroy advertising was destroyed.

In almost any other kind of case, the court's response would be clear: direct or set aside the compensatory damage verdict or order a new trial on damages. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1144 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1489 (1986); *Taliferro v. Augle*, 757 F.2d 157, 162 (7th Cir. 1985). As the Seventh Circuit so tersely put it, "if [plaintiffs] want damages they must prove them." *Douglass*, 767 F.2d at 1144. Plaintiff clearly did not prove any actual damages, let alone three million dollars' worth.

The compensatory damage question is complicated, however, because this is a case of libel *per se*, and it is well-established that in cases of libel *per se* plaintiff is entitled to "presumed damages." *E.g., Lorillard v. Field Enterprises, Inc.*, 65 Ill.App.2d 65, 213 N.E.2d 1, 7 (1st Dist. 1965); *Van Norman v. Peoria Journal-Star, Inc.*, 31 Ill.App.2d 314, 175 N.E.2d 805, 814-15 (2d Dist. 1961). "If the words are libelous *per se*, it is not necessary to allege or prove special damages, . . . damages being presumed. . . . Actual or compensatory damages also include general damages such as mental suffering and injury to reputation, and these need not be proved by evidence." *Lorillard*, 213 N.E.2d at 7. However, *substantial* damages are not presumed. *Bloomfield v. Retail Credit Co.*, 14 Ill.App.3d 158, 302 N.E.2d 88, 97 (1st Dist. 1973) (setting aside a jury award in a case of *per se* libel and ordering a new trial on damages); *see also, e.g., Buckley v. Littell*, 394 F. Supp. 918, 945 (S.D.N.Y. 1975), *aff'd in part and rev'd in part on other*

grounds, 539 F.2d 882 (2d Cir. 1976); *Abell v. Cornwall Industrial Corp.*, 241 N.Y. 327, 150 N.E. 132, 135 (1925) ("a right as a matter of law to compensatory damages does not necessarily imply a right to substantial damages"). In *Buckley*, the district court found no evidence that the plaintiff, who had been the victim of *per se* libelous statements, had suffered any actual injury. The court therefore awarded $1.00 nominal damages as compensatory damages and $7,500 in punitive damages. 394 F. Supp. at 945. (The Second Circuit reduced the punitive damage award to $1,000.) "Presumed" damages does not, therefore, mean that a plaintiff is entitled to any amount a jury sees fit to award, entirely independent of the evidence.

One authority states, "[a]lthough general damages were presumed [at common law], they were nonetheless intended to be an approximate compensation for real injury, 'some estimate, however rough, of the probable degree of *actual* loss a man will suffer given the particular charge against him, even though the loss cannot be identified in money terms.'" R. Sack, *Libel, Slander, and Related Problems* 347 (1980) (quoting *Dobbs on Remedies* § 7.2 at 514 (1973), *citing Dalton v. Meister*, 52 Wis.2d 173, 188 N.W.2d 494 (1971), *cert. denied*, 405 U.S. 934 (1972), and Restatement of Torts § 621 (1938)) (emphasis in original). Any other interpretation would allow a plaintiff to recover substantial sums without even attempting to introduce evidence as to injury and would preclude judicial review of the amount awarded.

Testimony that employees were distressed, upset, and furstrated is completely irrelevant. They are not plaintiffs; only the corporation is a plaintiff. A corporation is incapable of mental suffering, ordinarily a large component of the intangible harm to a human libel victim. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982). There was no evidence that plaintiff was ac-

tually experiencing increased difficulty from any governmental entity—only that the tobacco industry was affected by government regulation and one witness's *opinion* that the broadcast *would* have a negative effect. Similarly, there was no evidence that plaintiff actually suffered in the marketplace, only second and third hand reports of questions and negative comments by some customers. Since these questions and negative comments were reported only as hearsay, the substance of the remarks was not admitted.

Moreover, any possible residual effect of the broadcast was greatly reduced if not eliminated by the special verdict findings in plaintiff's favor on liability and by the widespread publicity that the trial testimony and verdict received. (See the compendiums of post-verdict publicity filed by the parties.)[14] The trial and verdict for the plaintiff was covered extensively, accurately, and fairly by both the electronic and press media. The results of the trial on liability were made known to all of the area where the original broadcast aired. Publication of a libel victory will ameliorate whatever injury might have been suffered. R. Sack, *Libel, Slander, and Related Problems* 355 (1980). Plaintiff obtained the declaration it sought in the complaint.

Plaintiff argues that some of the publicity the trial received was unfavorable to B&W and actually harmed plaintiff rather than helping it. But this argument confuses two issues. The negative publicity that B&W received was not the result of the trial and verdict but was primarily the result of other issues related to tobacco and smoking and was directed to the health hazards associated with smoking. Harm to B&W resulting from *this*

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[14] The parties were directed to file with the court copies of the newspaper reports and transcripts and recordings of the radio and television reports. Judicial notice can be taken of the massive publicity given the jury's verdict on liability. Fed. R. Evid. 201.

publicity was not due to Jacobson's broadcast, this trial, or the jury's verdict.[15]

A court may order a new trial if the award "was so excessive that the jury must have been carried away by 'passion and prejudice,'" *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1143 (7th Cir. 1985), or may order a remittitur if it finds that the jury award was not supported by the evidence. *Taliferro v. Augle*, 757 F.2d 157, 161 (7th Cir. 1985); *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1391-93 (7th Cir. 1984). The court may also set aside a jury verdict and can fix the proper level of damages if a plaintiff is entitled to a particular amount of damages as a matter of law. *McKinnon*, 750 F.2d at 1392. The court in *McKinnon* singled out the situation where a statute specifies a fixed sum as liquidated damages for a violation as an example of a case where it would be appropriate for a trial court to fix the level of damages. However, it was clearly meant only as one example. It is also proper for a court to fix the level of damages where it finds no evidence to support the jury award. *State of Washington v. United States*, 214 F.2d 33 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954), (affirming the trial court action in setting aside a verdict of $581,721.91 and directing that judgment be entered in the sum of $1.00 as nominal damages on the ground that there was not substantial evidence to sup-

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[15] Plaintiff also objects to judicial notice being taken after the verdict. Plaintiff argues that it was thus precluded from offering evidence and argument in rebuttal. But this argument misinterprets the operation of judicial notice. "Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof." Note of Advisory Committee to Rule 201(g). The court takes judicial notice only of the fact that there was widespread publicity that accurately reported the jury's verdict on liability. "In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal." Note of Advisory Committee to Rule 201(f).

port the jury's findings); *see Garrett v. Faust*, 183 F.2d 625 (3d Cir. 1950), *cert. denied*, 340 U.S. 931 (1951), (reducing the jury award from $17,000 to $3,609.10, where the interrogatories to the jury showed that they had awarded the difference, $13,390.90, as damages for either breach of contract or fraud and there was no evidence to support liability on either of those claims). These cases are consistent with *McKinnon*, since the decision whether there was sufficient evidence to go to the jury and therefore whether judgment notwithstanding the verdict should be granted is a question of law. *General Foam Fabricators, Inc. v. Tenneco Chemicals, Inc.*, 695 F.2d 281, 285 (7th Cir. 1982).

Defendants moved for a directed verdict on the issue of compensatory damages at the end of plaintiff's evidence on damages and again at the end of all the evidence on damages. Because Illinois law requires that actual injury be proved in order to recover *substantial* compensatory damages, and because plaintiff submitted no evidence showing actual injury, the court finds as a matter of law that a verdict should have been directed and judgment should be entered notwithstanding the verdict. The award of three million dollars is set aside and judgment will be entered in favor of the plaintiff in the amount of $1.00 as nominal compensatory damages.[16]

Nominal compensatory damages are permitted by the law. They serve the purpose of vindicating plaintiff's reputation. *See Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *cert. denied*, 429 U.S. 1062 (1977); *Airlie Foun-*

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[16] If it should be found, on appeal, that it is improper to set damages by granting judgment notwithstanding the verdict, then, alternatively, the court finds that the award of three million dollars in compensatory damages was excessive and orders a remittitur of $2,999,999.00, reducing the award to $1.00, with the condition that if plaintiff chooses to reject the remittitur there be a new trial on the issue of compensatory damages. *McKinnon*, 750 F.2d at 1391-92. Fed. R. Civ. P. 50(c)(1).

dation, Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421 (D.D.C. 1972) They also serve as a foundation for punitive damages They do not provide an unwarranted windfall.

B. Punitive Damages

Defendants move the court to set aside the awards of punitive damages and order judgment notwithstanding the verdict, a new trial, or a remittitur. In support of this motion defendants make essentially three arguments: (1) that punitive damages in a case of a public figure plaintiff are unconstitutional, even when a plaintiff proves both actual malice and express malice (also known as common law malice); (2) that the jury was improperly instructed on the issue of express malice; and (3) that there was no evidence to support a finding of express malice. Defendants also contend that evidentiary errors affected the award of punitive damages.

In *Gertz v. Robert Welch, Inc.*, 418 U.S.C. 325 (1974), the Supreme Court stated that defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth are restricted to compensation for actual injury. 418 U.S. at 349. Punitive damages are therefore unavailable unless the plaintiff proves actual malice. Here, plaintiff did prove actual malice. Defendants argue, however, that when the plaintiff is a public figure and the statement concerns a matter of public interest, punitive damages are unavailable *even if* plaintiff proves actual malice, as a matter of constitutional law. But the Seventh Circuit has clearly stated that if a public figure plaintiff does prove actual malice it can recover punitive damages. *Brown & Williamson*, 713 F.2d 262, 273 (7th Cir. 1983); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976). Therefore, this court must reject defendants' argument.

Defendants argue that the instruction to the jury on "express malice" was incorrect and applied a more re-

laxed standard than required by Illinois law. The jury was instructed that punitive damages are imposed to punish a defendant who the jury finds is guilty of "ill-will, evil motive, intention to injure without just cause or excuse, or a wanton disregard of another's rights." (Tr. 2224). This charge is consistent with Illinois law and in fact mirrors the language defining common-law malice in *Fopay v. Noveroske*, 31 Ill.App.3d 182, 334 N.E.2d 79, 91 (5th Dist. 1975). *See also Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 23 Ill.Dec. 559, 565, 384 N.E.2d 353, 359 (1978) (punitive damages may be awarded when torts are committed "with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others"); *Michaels v. Michaels*, 767 F.2d 1185, 1204 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 797 (1986) ("Illinois courts have long recognized that punitive damages are appropriate when torts are committed with fraud or actual malice or when the defendant acts willfully or with a wanton disregard for the rights of others").

Defendants argue that the Seventh Circuit opinion in this case required that express malice be limited to those situations where a statement was "made solely for the purpose of causing harm to the person defamed." 713 F.2d at 272 (quoting Restatement of Torts § 611(b) (1938)). However, in the Seventh Circuit opinion, § 611 (b), and *Lulay v. Peoria Journal-Star, Inc.*, 34 Ill.2d 112, 214 N.E.2d 746 (1966) (relied on by the Seventh Circuit), the issue was under what circumstances the privilege of fair summary was forfeited—not under what circumstances punitive damages could be awarded. Although the courts used the expressions "actual malice" (in *Lulay*) and "express malice" (in *B&W*), that appears to be merely a reflection on the imprecision of the language (assuming the standards are different). In light of *Michaels* and other more recent Illinois cases

dealing with punitive damages, the Seventh Circuit was not reciting the standard for punitive damages in *B&W*.

The evidence was such that a reasonable jury could find that defendants made the broadcast with "express" or "common-law malice." The content of the broadcast, together with the fact that defendants knew it to be false or seriously doubted its truth (as found by the jury and upheld by this court on review), is perhaps the strongest evidence of ill-will on the part of defendants. A jury could find that statements accusing plaintiff of being "slicksters" and "liars" and of attempting to entice children to smoke by disreputable methods, statements held by the Seventh Circuit to be libelous *per se*, are intended to injure B&W. And when defendants knew these statements were false, or seriously doubted that they were true, then a jury could find that the statements were intended to injure B&W without just cause or excuse. As the Seventh Circuit remarked in *Robison v. Lescrenier*, 721 F.2d 1101, 1111 (7th Cir. 1983), (quoting the Wisconsin Supreme Court in *Noonan v. Ortin*, 32 Wis. 106, 113 (1873), and applying the Wisconsin rule on punitive damages very similar to that of Illinois): "The making of a false accusation, knowing it to be false, could hardly be regarded as otherwise than malicious." A reasonable jury could have concluded that defendants acted with express malice.

The amounts of the punitive damage awards were not excessive. In fixing the amount of punitive damages, the jury was entitled to consider defendants' wealth. *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill.App. 3d 703, 71 Ill.Dec. 320, 328, 450 N.E.2d 1199, 1207 (4th Dist. 1983); *Fopay v. Noveroske*, 31 Ill.App.3d 182, 334 N.E.2d 79, 93 (5th Dist. 1975). As the court explained in *Hazelwood*, "[p]unitive damages should be large enough to provide retribution and deterrence but should not be so large that the award destroys the defendant."

71 Ill.Dec. at 328. The evidence showed that CBS's net worth was approximately one and one half billion dollars, making the two million in punitive damages only approximately 0.13% of that net worth. And the net worth of Jacobson was over five million dollars, making the fifty thousand dollars in punitive damages awarded against him less than 1% of his net worth.

The jury was also entitled to consider the amount of attorneys' fees incurred by the plaintiff in finding punitive damages. *Hazelwood*, 71 Ill. Dec. at 327, 450 N.E. 2d at 1206; *Anvil Investment Limited Partnership v. Thornhill Condominiums, Ltd.*, 85 Ill.App.3d 1108, 407 N.E.2d 645, 654, 41 Ill.Dec. 147, 156 (1st Dist. 1980). Plaintiff's attorneys' fees as of the time of trial amounted to more than 1.36 million dollars—more than two-thirds of the punitive damage award.

Finally, there was evidence presented that after the verdict on liability had been rendered, Jacobson stated in public that he would not allow the verdict to affect his professional conduct. Since one purpose of punitive damages is deterrence, a jury can properly consider evidence of recalcitrance in determining the punitive damage award. *See Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Machleder v. Diaz*, 618 F. Supp. 1367, 1375-76 (S.D.N.Y. 1985). In light of all the circumstances, the punitive damage award was not excessive and should stand.

IT IS THEREFORE ORDERED that:

(1) Defendants' motion for judgment notwithstanding the verdict or a new trial is denied as to liability.

(2) Defendants' motion for judgment notwithstanding the verdict is granted as to compensatory damages and the court enters judgment in the amount of $1.00 as nominal compensatory damages.

(3) Defendants' motion for judgment notwithstanding the verdict, a new trial, or a remittitur as to punitive damages is denied. Punitive damages shall stand at two million dollars as to CBS and fifty thousand dollars as to Jacobson.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: August 7, 1986

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Cause No. 82 C 1648

HONORABLE JOSEPH SAM PERRY

BROWN & WILLIAMSON TOBACCO CORP.

vs.

WALTER JACOBSON and CBS, INC.

July 6, 1982

This cause comes on upon defendants' motion to dismiss plaintiff's complaint with prejudice. The court has read and considered said motion and the memoranda of the respective parties and finds that said motion is well taken and should be granted for the reasons set forth in defendants' memoranda. The court is of the opinion that to deny this motion would unduly restrict the freedom of the press and the right of a journalist to express opinions freely.

Accordingly, it is ORDERED that said motion is granted and that the complaint herein is DISMISSED with prejudice.

/s/ Joseph Sam Perry
JOSEPH SAM PERRY

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 12, 1987

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge

Nos. 86-2474
86-2475

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellant, Cross-Appellee,

vs.

WALTER JACOBSON and CBS, INC.,
Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 1648—Judge William T. Hart

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART, in accordance with the opinion of this Court filed this date. Costs on appeal are assessed against Jacobson and CBS.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

November 16, 1987

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge

Nos. 86-2474 and 86-2475

BROWN & WILLIAMSON TOBACCO CORPORATION,
Plaintiff-Appellee, Cross-Appellant,

vs.

WALTER JACOBSON and CBS, INC.,
Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 82 C 1648—William T. Hart, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by Defendants-Appellants, Cross-Appellees Walter Jacobson and CBS, Inc., no judge in active serv-

ice* has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Walter J. Cummings, Circuit Judge, did not participate in consideration of the petition for rehearing *en banc*.

TRANSCRIPT AS SPOKEN

WALTER JACOBSON PERSPECTIVE
WBBM-TV

Wednesday, November 11, 1981.

Harry Porterfield:

For the past two nights in Perspective, Walter has been reporting on the companies that make cigarettes and the clout they carry in Washington.

Tonight he has the last in his series of special reports, a look at how the cigarette business gets its customers.

Walter Jacobson:

Ask the cigarette business how it gets its customers and you will be told over and over again, that it's hard these days to get customers; that the good old days are gone forever. The good old ads for cigarettes cannot be used anymore. Old St. Nick, for example, pushing Lucky Strikes because . . . "Luckies are easy on my throat." The cigarette business can't count on that kind of an ad anymore. Or the doctors pushing Camels; more doctors smoke Camels than any other cigarette. The business can't count on an ad like that anymore, either.

Nor can it count anymore on television. Pushing cigarettes on television is prohibited. Television is off limits to cigarettes. And so the business (the killer business) has gone to the ad business in New York for help; to the slicksters on Madison Avenue, with a billion dollars a year for bigger and better ways to sell cigarettes.

Go for the youth of America. Go get 'em, guys. Get some young women, give them some samples. Pass them out on the streets, for free, to the teenagers of America.

Hook 'em while they're young. Make 'em start now. Just think how many cigarettes they'll be smoking when they grow up.

Or, here's another cigarette-slickster idea. The Merit Report wants your opinion; a survey, they say, on current events. A $270,000 Merit wagon. Walk in, children, and let us know what you think about President Reagan. Get involved, children. Thank you, on behalf of Merit cigarettes. Or another cigarette-slickster idea. Go for the children through sports. You'll never guess who's likely to be a winner at the Winter Olympics. How about Rudd Pyles, from Colorado? But better than that, how about Benson & Hedges? At-a-way. The best possible way to addict the children to poison.

That's an obvious way to addict the children to poison. There are more subtle ways, as well. A scene, for example, in Superman II. A bus crashing into a truck. Could be any truck, couldn't it? But, in a movie that's being seen by millions of children who love Superman, the bus crashes into a Marlboro truck.

The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.

That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising. The Viceroy strategy for attracting young people (starters, they are called) to smoking.

"For the young smoker a cigarette falls into the same category with wine, beer, shaving, or wearing a bra," says the Viceroy strategy. "A declaration of independence

and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarette as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, sex. Do not communicate health or health-related points."

That's the strategy of the cigarette-slicksters, the cigarette business which is insisting in public . . . We are not selling cigarettes to children.

They're not slicksters. They're liars.

(EXCERPTS)

THIS DOCUMENT CONTAINS
CONFIDENTIAL INFORMATION

FEDERAL TRADE COMMISSION

STAFF REPORT ON THE CIGARETTE ADVERTISING INVESTIGATION

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Division of Advertising Practices

CONCUR:

James Sneed
Director
Bureau of Consumer Protection

May, 1981

* * * *

[2-15]*

V. EFFORTS OF SOME CIGARETTE ADVERTISEMENTS TO DIVERT ATTENTION AWAY FROM THE HEALTH HAZARDS OF SMOKING

Many cigarette advertising techniques appear to denigrate or undercut the health warning. Information obtained from subpoenaed documents indicates that, at least in the case of several advertising campaigns, these techniques have been carefully planned. For example, documents from Brown & Williamson (B&W) and one of its advertising agencies, Ted Bates and Company, Inc., set forth the development of an advertising strategy for Viceroy cigarettes designed to suppress or minimize public concern about the health effects of smoking.

The documents show that, at the request of Ted Bates, a marketing and research firm conducted a number of focus group interviews on the subject of smoking in order to assist the ad agency in developing a marketable image for Viceroy cigarettes.[39] The final report summarizing the results of this research asserts that many smokers [2-16] perceive the smoking habit as a "dirty" and dangerous one engaged in only by "very stupid people."[40] The report concludes:

> Thus, the smokers have to face the fact that they are illogical, irrational and stupid. People find it hard to go throughout life with such negative presentation and evaluation of self. The saviours are the *ra-*

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* FTC Report original pagination.

[39] Document A011345—"An Action-Oriented Research Program For Discovering And Creating The Best Possible Image For Viceroy Cigarettes," prepared for Ted Bates Advertising in March 1975 by N. Kennan, Marketing and Research Counselors, Inc.

[40] Document A901268—May 26, 1975 "What Have We Learned From People? A Conceptual Summarization of 18 Focus Group Interviews On The Subject Of Smoking."

> *tionalization* and the *repression* that end up and result in a defense mechanism that, as many of the defense mechanisms we use, has its own 'logic', its own rationale.
>
> * * * *
>
> Thus, smokers don't like to be reminded of the fact that they are illogical and irrational. They don't want to be reminded by either *direct* or *indirect* manner.[41]

The report proceeds to describe the elements of a good cigarette advertising campaign, in light of its findings, in a chapter entitled, "How To Reduce Objections To A Cigarette." The basic premise of the report's recommendations is that since there "are not any real, absolute, positive qualities and attributes in a cigarette," the most effective advertising is designed to "*reduce objections*" [42] to the product by presenting a picture or situation ambiguous enough to provide smokers with a rationale for their behavior and a means of repressing their health concerns about smoking. To provide a rationale for smoking, the ad must project the [2-17] image that cigarettes provide the smoker with social acceptance, an acceptable means of rewarding himself or herself, a stimulant, a transquilizer, a better self-image, etc. With regard to health issues, the report recommends: "Start out from the basic assumption that cigarette smoking is dangerous to your health—try to go around it in an elegant manner but don't try to fight it—it's a losing war." [43]

One chapter of the report describes how the company can introduce "starters" to the Viceroy brand, a discussion which focuses almost exclusively on how to persuade young people to smoke. The report asserts:

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[41] *Id.* at 2, 3 (emphasis in original).

[42] *Id.* at 12 (emphasis in original).

[43] *Id.* at 17.

> For the young smoker, the cigarette is not yet an integral part of life, of day-to-day life, in spite of the fact that they try to project the image of a regular, run-of-the-mill smoker. For them, a cigarette, and the whole smoking process, is part of the illicit pleasure category . . . In the young smoker's mind a cigarette falls into the same category . . . with wine, beer, shaving, wearing a bra (or *purposely* not wearing one), declaration of independence and striving for self-identity. For the young starter, a cigarette is associated with introduction to sex life, with courtship, with smoking 'pot' and keeping late studying hours.[44]

The chapter then recommends a strategy for attracting young "starters" to cigarette smoking:

> [2-18] Thus, an attempt to reach young smokers, starters, should be based, among others, on the following major parameters:
>
> —Present the cigarette as one of a few initiations into the adult world.
>
> —Present the cigarette as part of the illicit pleasure category of products and activities.
>
> * * * *
>
> —In your ads create a situation taken from the day-to-day life of the young smoker but in an elegant manner have this situation touch on the basic symbols of the growing-up, maturity process.
>
> —To the best of your ability, (considering some legal constraints), relate the cigarette to 'pot', wine, beer, sex, etc.

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[44] *Id.* at 29-30 (emphasis in original).

—*Don't* communicate health or health-related points.[45]

B&W adopted many of the ideas contained in this report in the development of a Viceroy advertising campaign. Thus, in a document entitled, "Viceroy Strategy," B&W notes repeatedly that its advertising campaign must provide consumers with a rationalization for smoking and a "means of *repressing* their health concerns about smoking a full flavor Viceroy." [46] The following excerpts from "Viceroy Strategy" are representative and indicate that in B&W's view, the other cigarette companies also have developed advertising [2-19] strategies designed to cause repression of consumer health concerns about smoking:

> Full flavor smokers perceive cigarette smoking as dangerous to their health . . . Given their awareness of the smoking and health situation, they are faced with the fact that they are behaving illogically. They respond to this inconsistency by providing themselves with either a rationalization for smoking, or, by repressing their perceptions of the possible dangers involved. *To date, major full flavor brands have either consciously or unconsciously 'coped' with the smoking and health issues in advertising by appealing to repression.* [emphasis added.]
>
> * * * *
>
> The marketing efforts must cope with consumers' attitudes about smoking and health, either providing them a *rationale* for smoking a full flavor VICEROY or providing a means of *repressing* their concerns about smoking a full flavor VICEROY. [emphasis in original.]
>
> * * * *

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[45] *Id.* at 31.

[46] Document A015538—"Viceroy Strategy," March 3, 1976, V.C. Broach, Group Project Manager, B&W (emphasis in original).

> *Advertising Objective*—To communicate effectively that VICEROY is a satisfying flavorful cigarette which young adult smokers enjoy, by providing them a rationalization for smoking, or, a repression of the health concern they appear to need.

B&W then describes its plan to accomplish its advertising objective. Three advertising strategies would be used:

1. The 'satisfaction' campaign provides a *rationalization*: VICEROY is so satisfying that smokers can smoke fewer cigarettes and still receive the satisfaction they want . . . .

2. The 'tension release' camapign provides a *rationalization*: VICEROY's satisfying flavor can help the smoker in a tense situation. . . .

3. The 'feels good' campaign appeals to the smoker by *repressing the concerns* he may have about smoking *by justification*: If it feels good, do it; if it [2-20] feels good, smoke it. . . .[47]

B&W documents also show that it translated the advice on how to attract young "starters" into an advertising campaign featuring young adults in situations that the vast majority of young people probably would experience and in situations demonstrating adherence to a "free and easy, hedonistic lifestyle." [48]

Other documents submitted by B&W show that the company has attempted to capitalize upon the erroneous con-

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[47] These strategies were employed in a six-month media campaign conducted in three test cities in 1976. The advertising allotment for the campaign was approximately ten times the normal advertising dollar amount for a six month period. (Document A015486—Memorandum from M.M. Matteson to V.C. Broach, July 14, 1976, emphasis added).

[48] Document A080115—"Viceroy Marketing/Advertising Strategy," January 26, 1976.

sumer perception that there is a health benefit to smoking mentholated cigarettes. Documents pertaining to the marketing of Kool cigarettes demonstrate that the company is aware of the consumer misperception about the relative safety of menthol cigarettes and utilizes it in the development of advertising strategies for Kools." [49]

[2-21] A third set of documents obtained from Brown and Williamson reveal that in 1976, Brown and Williamson introduced a new brand of cigarette named Fact. The Brown and Williamson documents indicate that the company believed that Fact cigarettes were a new product which reduced the amount of harmful gas in the cigarette smoke inhaled by the consumer. Therefore, Fact was initially advertised as a brand with the unique ability

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[49] In 1976, B&W held four focus group discussions to gauge menthol smokers' responses to a new Kool 120mm cigarette. The majority of the participants were menthol cigarette smokers. In a number of cases, the participants told B&W that they switched to menthol either for health considerations or from a general feeling that menthol cigarettes are less dangerous. According to B&W, a "pseudo-health image" has accrued to mentholated cigarettes. (Document A080675—"Low Tar Longs Project—Creative Agency Assignment," 1977.) By characterizing the health image of mentholated cigarettes "pseudo," B&W admits its knowledge that menthol is of no health benefit to smokers. In a 1978 document discussing Kool cigarettes' strengths and weaknesses, B&W also admits that one of Kool's strengths "rides on the connotation that menthol has health overtones." (Document A006981—Memorandum from R.L. Johnson to F.E. McGowan, B&W, March 13, 1978.) In addition, B&W states that one of the strengths of its Kool Super Longs is that "menthol and 'tar' delivery has synergistic therapeutic implications." (*Id.*) B&W intends to exploit this false belief. In its document describing Kool's objectives through 1981, B&W states that its strategy will be to provide product safety reassurances while enhancing the satisfaction and refreshment perception. (Document A035669—"Kool Three-Year Objectives," August 15, 1978.)

In fact, mentholated cigarettes tend to have a high "tar" and nicotine content.

to filter certain gases.[50] However, initial sales of Fact were not considered satisfactory by Brown and Williamson, so in 1977 it temporarily halted all advertising and promotion of the cigarette while it developed a new market strategy.[51]

[2-22] In April 1977, Brown and Williamson's advertising agency, Post-Keyes Gardner, Inc., presented Brown and Williamson with its marketing and strategy recommendations for the reintroduction of Fact cigarettes.[52] The ad agency proposed two possible strategies to distinguish Fact from other cigarettes: 1) "More complete health protection through selective gas filtration," 2) "More taste and satisfaction in a low tar cigarette."[53] About the proposed strategy focusing on better health protection as the result of inhaling lower levels of gas, Post-Keyes-Gardner, Inc. wrote:

> A secondary opportunity to distinguish Fact from the mass of tar number claims is by capitalizing on the product's unique selective gas filtration. This would demand "*product image*" advertising and would provide the brand with a real point of difference. It would mean expanding the cigarette health issue beyond tar to encompass gas. However, this would require establishing "gas" as a meaningful health hazard in cigarettes because currently there is very low consumer awareness or comprehension of the gas

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[50] Document 7244—"Fact 1976 Concept Description and Potential and Marketing Plan."

[51] Document 35523—"Fact 1977 Repositioning and 1978 Marketing Plan Summary."

[52] Document 35524—Brown & Williamson, "Marketing Advertising Strategy Recommendations for the Reintroduction of Fact Cigarettes," April 18, 1977. (The same document was also submitted by Post-Keyes & Gardner, Inc.—Document 714569).

[53] *Id.*

> problem. The Agency believes one of the major problems with the introductory advertising for Fact was that it failed to educate health concerned consumers about the dangers of gas. This failure to establish the gas problem meant that Fact's selective filtration promise was meaningless to the majority of the target audience. However, if smokers are effectively educated regarding this problem, the selective gas filtration promise may still be powerful, particularly among the very health conscious.[54]

[2-23] However, the agency also noted the weakness of this proposed strategy:

> This strategic option assumes gas will become a major health issue. To ensure it becomes an issue will require an educational approach in introductory advertising. It is questionable whether any cigarette manufacturer should be publicizing a new health hazard for cigarette smokers. The desire to avoid spelling out the gas hazard in advertising could severely weaken the effectiveness of this approach.[55]

Ultimately, Brown and Williamson documents indicate that it elected not to educate the public about the health hazards associated with the gases in cigarette smoke and not to focus the Fact ad campaign on the low gas issue. The reason for Brown and Williamson's decision is explained in a document entitled "Fact 1977 Repositioning and 1978 Marketing Summary":

> Until the problem of gas becomes *public knowledge through government investigation or media coverage*, a low gas benefit will remain of little strategic value. [emphasis added] [56]

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[54] *Id.*, at 3.

[55] *Id.*, at 6.

[56] Document 35523—"Fact 1977 Repositioning and 1978 Marketing Plan Summary."

The rationale is restated in a memorandum from the representative of the Brown and Williamson "Brand Group" which had overall responsibility for Fact:

> We do *not* support definition in advertising of the problem of gas in order to specifically communicate its consumer benefit and distinguish it from low "tar". To supply such definition would require overt references to the alleged ciliatoxic and cardiovascular ill effects of smoking. The possible ramifications of this in the Legal, Regulatory, and Policy areas are appalling . . . a likely result of such [2-24] activity on our part would be escalation of quitting rates among smokers.[57]

Thus, despite the potential market advantage it might have obtained over its competitors by advertising the unique gas filtration system of Fact cigarettes, Brown and Williamson chose not to do so in order to avoid educating the public about the presence and hazardous nature of gases in cigarette smoke.

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[57] Document 11455—Memorandum from G.T. Reid to F.E. McKeown dated March 22, 1978.

No. 87-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,

Petitioners,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF CAPITAL CITIES/ABC, INC., DOW JONES & COMPANY, INC., FOX TELEVISION STATIONS INC., THE HEARST CORPORATION, NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, TIME, INC., AND THE WASHINGTON POST AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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No. 87-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,

Petitioners,

—v.—

BROWN & WILLIAMSON TOBACCO CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox Television Stations Inc., The Hearst Corporation, National Broadcasting Company, Inc., Newsweek, Inc., The New York Times Company, Time, Inc., and The Washington Post ("Amici") move, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file a brief as *amici curiae* in support of petitioners. Amici have sought written consent from petitioners and respondent and have obtained consent from petitioners; respondent has not consented. Petitioners' written consent has been filed with the Clerk of the Court.

Amici constitute a broad cross-section of the news media in this country and are actively involved in the collection and dis-

semination of news. Amicus Capital Cities/ABC, Inc., through subsidiaries, owns and operates television and radio broadcasting stations and national television and radio networks; it also publishes newspapers and magazines. Amicus Dow Jones & Company, Inc. publishes, *inter alia, The Wall Street Journal, Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, and a number of community daily newspapers through its Ottaway Newspapers, Inc. subsidiary. Amicus Fox Television Stations Inc. owns and operates seven television stations in major metropolitan areas throughout the country.

Amicus The Hearst Corporation is a diversified, privately held company that publishes newspapers, magazines, and hardcover and soft-cover books, and owns and operates a leading feature syndicate, television and radio broadcasting stations, and cable television systems. Amicus National Broadcasting Company, Inc. owns television stations and operates a national television network. Amicus Newsweek, Inc. publishes a weekly international news magazine, *Newsweek*.

Amicus The New York Times Company publishes numerous magazines and newspapers, including *The New York Times*, a daily newspaper with nationwide circulation, and some 35 regional newspapers; it also owns radio and television properties. Amicus Time, Inc. is the largest publisher of general circulation magazines in the United States; it publishes *Time, Fortune, Sports Illustrated, People, Money*, and *Life*. Amicus The Washington Post is a daily newspaper of general circulation published in the Washington, D.C. metropolitan area, with a daily circulation of nearly 800,000 and a Sunday circulation of approximately 1,100,000.

This petition raises important questions concerning the constitutionality of presumed and punitive damages in defamation cases. Amici seek to address only these constitutional questions. Each Amicus has been a defendant in defamation suits seeking substantial presumed and punitive damages, and each has had to face the threat of expensive and time-consuming litigation when making editorial decisions. Consequently, Amici have a

vital interest in the standards to be applied to awards of defamation damages. Amici's close familiarity with the questions here at issue, and their broad perspective on the effects of presumed and punitive damages, enable them to contribute to this Court's consideration of petitioners' petition.

Dated: New York, New York
March 14, 1988

Respectfully submitted,

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BRIEF OF CAPITAL CITIES/ABC, INC., DOW JONES & COMPANY, INC., FOX TELEVISION STATIONS INC., THE HEARST CORPORATION, NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, TIME, INC., AND THE WASHINGTON POST AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Statement of Interest

A motion for leave to file this brief, brought by Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox Television Stations Inc., The Hearst Corporation, National Broadcasting

Company, Inc., Newsweek, Inc., The New York Times Company, Time, Inc., and The Washington Post ("Amici"), is attached to the front of this brief pursuant to Rule 36 of this Court's Rules. That motion contains a statement of Amici's interest in this action.

Reasons for Granting the Writ

This case squarely presents a question left open by this Court's decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985): under what circumstances, if any, may a public plaintiff[1] recover presumed and/or punitive damages in a defamation action based on statements involving matters of public concern?

Gertz held that a *private* plaintiff could not recover presumed or punitive damages for allegedly defamatory statements involving matters of *public* interest ("public speech") without "at least" proving the defendant's "knowledge of falsity or reckless disregard for the truth," 418 U.S. at 349; *Dun & Bradstreet* allowed a private plaintiff to obtain presumed and punitive damages on a showing of something less than "actual malice" where the alleged defamation involved a matter of purely *private* concern. These holdings leave open the constitutional standards applicable in a *public* plaintiff's defamation action involving speech of substantial *public* interest, an issue with which numerous courts and commentators have grappled for many years.[2]

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1 This brief uses the term "public plaintiff" to refer collectively to public officials and public figures. There appears to be no dispute about respondent's public-figure status. *See* App. at 16a. (Citations to "App." refer to the Appendix to petitioners' Petition for Certiorari.)

2 *See, e.g., Dun & Bradstreet*, 472 U.S. at 778-79 (Brennan, J., with Marshall, Blackmun, and Stevens, JJ., dissenting); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 74-77 (1971) (Harlan, J., dissenting); *id.* at 82-86 (Marshall, J., with Stewart, J., dissenting); R. Sack, *Libel,*

The instant case presents that open question in a particularly crystallized form, for the libel award in issue consists exclusively of presumed damages ($1,000,000) and punitive damages ($2,050,000), all awarded to a public plaintiff that had indisputably failed to prove any cognizable injury to its business or reputation. The need to address the constitutionality of such a result is compelling, in light of the serious difficulties that presumed and punitive damages pose to First Amendment values. Punitive damages impermissibly inflict punishment for speech about public matters without directly serving the countervailing state interest in redressing injury to reputation. Presumed damages, whose existence is based on the questionable assumption that actual injury is impossible to prove, impermissibly encourage juries to award large sums of money where there is no evidence of any injury at all. These standardless damage rules accord juries largely uncontrolled discretion to punish unpopular speech and are largely responsible for the chaotic and unpredictable state of defamation litigation in trial courts throughout the country.

Slander, and Related Problems 346-54 (1980); Anderson, "Libel and Press Self-Censorship," 53 Tex. L. Rev. 422, 477 (1975); Arkin & Granquist, "The Presumption of General Damages in the Law of Constitutional Libel," 68 Colum. L. Rev. 1482 (1968); Goodale, "Damages in Defamation Actions," *Damages in Tort Actions*, vol. 5, §§ 45.21[2][b] & [4] (1985); Hill, "Defamation and Privacy Under the First Amendment," 76 Colum. L. Rev. 1205, 1251-53 (1976); Report, Committee on Communications Law, "Punitive Damages in Libel Actions," 42 Record of Ass'n of Bar of City of N.Y. 20 (Jan./Feb. 1987) ("Report"); Sack & Tofel, "First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages," 90 Dick. L. Rev. 609 (1986); Note, "The Constitutionality of Punitive Damages in Libel Actions," 45 Fordham L. Rev. 1382 (1977); Note, "Punitive Damages and Libel Law," 98 Harv. L. Rev. 847 (1985); Note, "Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech," 64 Yale L.J. 610 (1955); Recent Cases, "Punitive Damages in Defamation Actions Brought by Public Figures Chill First Amendment Rights and Are Unconstitutional Unless Narrowly and Necessarily Promoting Compelling State Interest," 28 Vand. L. Rev. 887 (1975).

To vindicate the "robust political debate encouraged by the First Amendment," and to insure for freedom of expression the "breathing space" that it needs to survive and flourish, *Hustler Magazine, Inc. v. Falwell*, 56 U.S.L.W. 4180, 4181 (U.S. Feb. 23, 1988), this Court should grant certiorari and hold both presumed and punitive damages unconstitutional in public-plaintiff defamation actions involving public speech.

I. THE FIRST AMENDMENT DEMANDS HEIGHTENED SENSITIVITY TO THE INTEREST IN PROTECTING SPEECH ABOUT PUBLIC PLAINTIFFS AND PUBLIC ISSUES WHEN ESTABLISHING RULES OF DAMAGES.

This Court has acknowledged the "tension [that] necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Gertz*, 418 U.S. at 342. On one hand, the First Amendment interest in fostering freedom of expression requires the protection of certain falsehoods because such statements are inevitable in free debate, *Hustler Magazine*, 56 U.S.L.W. at 4181, and because "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press," *Gertz*, 418 U.S. at 340. On the other hand, the Court has recognized "[t]he legitimate state interest . . . [in] compensati[ng] . . . individuals for the harm inflicted on them by defamatory falsehood." *Id.* at 341.

To accommodate these competing concerns, the Court has held that the relative values of robust debate and of compensating individuals for reputational injury vary with the status of the particular plaintiff and with the nature of the particular speech at issue. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Speech concerning public plaintiffs and matters of public interest has been treated as particularly deserving of protection. *Compare New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964) (*public* plaintiff cannot establish liability unless he can prove with "convincing clarity" that complained-of statement was false and was made with "actual malice") *with Philadelphia Newspapers*, 475 U.S.

at 775, *and Gertz*, 418 U.S. at 347 (*private* plaintiff can establish liability on lesser showing). Heightened protection for this speech has been justified because (*a*) the public has a validly stronger interest in information about public plaintiffs and their activities, (*b*) public plaintiffs usually enjoy significant access to the media to express their views and rebut allegedly defamatory statements, and (*c*) persons who have entered the public arena must be deemed to have accepted "the risk of closer public scrutiny than might otherwise be the case." *Gertz*, 418 U.S. at 344.

For the same reasons, rules of presumed and punitive damages must be considered with heightened sensitivity to First Amendment values in cases involving public plaintiffs and public speech. The specter of such damages casts a separate and additional chill on robust debate about public matters, wholly apart from the possibility of having to defend against assertions of liability. Such damages pose the threat that a misstep will lead to crippling monetary awards wholly out of proportion to any actual injury.[3] That threat unquestionably affects editorial judgments respecting the publication of newsworthy material. Massing, "The Libel Chill: How Cold *Is* It Out There?," Colum. Journalism Rev. 31 (May/June 1985). At the same time, presumed and punitive damages are less appropriate than in private-plaintiff cases, because public plaintiffs have a less legitimate interest in shielding themselves from the attentions of the press and are more likely to be able to mitigate or repair any harm to their reputation. *Gertz*, 418 U.S. at 344.

This Court has determined that different types of plaintiffs and speech warrant different rules governing awards of presumed and punitive damages. *Compare Dun & Bradstreet*, 472 U.S. at 761 (private plaintiff in *private*-speech case may recover presumed and punitive damages without proof of "actual malice") *with Gertz*, 418 U.S. at 349 (private plaintiff suing on the

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3 Indeed, many states, as a matter of public policy, do not permit insurance coverage of punitive damages. *See, e.g., Hartford Accident & Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979).

basis of *public* speech may *not* recover such damages without "at least" such proof). Similar sensitivity to the special First Amendment interests implicated in cases involving public plaintiffs and public speech requires an absolute prohibition against presumed and punitive damages, even on a showing of "actual malice."

II. THE PURPORTED INTERESTS SUPPORTING PUNITIVE DAMAGES FOR PUBLIC DEFAMATION PLAINTIFFS ARE INSUFFICIENT TO OVERCOME THE FIRST AMENDMENT INTEREST IN PROHIBITING THEM.

Punitive damages in the public-plaintiff/public-speech defamation context cannot be squared with the First Amendment interest in according heightened protection to such speech.[4] In attempting to resolve the tension between the common law of defamation and the First Amendment, this Court has identified only a single state interest that can justify imposing liability for allegedly defamatory speech: the interest in compensating defamed individuals for actual injury to reputation. By its nature, that interest "extends no further than compensation for actual injury." *Gertz*, 418 U.S. at 349. As this Court has observed, "States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Id.*

Punitive damages do not satisfy this interest. They are not compensation for injury. Indeed, they do not focus on the plaintiff at all. Rather, such damages "are private fines levied

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4 Many judges and commentators have recognized the unconstitutionality of punitive damages, at least in cases involving public plaintiffs and public speech. *See, e.g., Rosenbloom*, 403 U.S. at 82-86 (Marshall, J., dissenting); Anderson, *supra*, 53 Tex. L. Rev. at 477; Hill, *supra*, 76 Colum. L. Rev. at 1253; Report, *supra*, at 24, 42-45; Note, *supra*, 64 Yale L.J. at 612-13; *see also Dun & Bradstreet*, 472 U.S. at 778-79 (Brennan, J., dissenting); *cf. Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161, 169 (1975) (rejecting punitive damages "in any defamation action, on any state of proof").

by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350.

Damages that serve only the aims of punishment and deterrence are extremely dangerous in the First Amendment context, because they exact punishment for speech, seek to prevent or influence future expression (and often undesirably succeed in that effort), and impose financial burdens on the press far out of proportion to any actual injury. Such damages also are particularly problematic because they permit jurors, whose discretion "is limited only by the gentle rule that [such damages] not be excessive," to "assess punitive damages in wholly unpredictable amounts . . . [a]nd . . . use their discretion selectively to punish expressions of unpopular views." *Id.*; *accord*, *Rosenbloom*, 403 U.S. at 84 (Marshall, J., dissenting). As this Court recently reaffirmed, the First Amendment prohibits the imposition of damages designed to punish unpopular expression. *See, e.g.*, *Hustler Magazine*, 56 U.S.L.W. at 4182 (barring imposition of liability for "outrageousness" or offensiveness, even if it intentionally causes emotional harm).

The constraints that punitive damages place on robust debate are very real and substantial, because juries have demonstrated a pronounced tendency in recent years to award punitive damages in the overwhelming majority of defamation cases, and in staggering amounts.[5] Those constraints should not be permitted

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5 In a two-year period between 1984 and 1986, for example, libel juries awarded punitive damages in nearly two-thirds of all damage cases. Nearly one quarter of those awards amounted to $1 million or more, with the average award exceeding $600,000. Libel Defense Resource Center, "LDRC Litigation Study #9—Defamation Trials, Damage Awards and Appeals III: Two-Year Update (1984-86)" at 3, 13, 19 (1988) ("LDRC Study"). Although the average punitive-damages award was reduced very substantially after post-trial motions and appeals, *id.* at 21-30, these reductions have not eliminated either the enormous amounts of time, energy, and money that defendants have spent to litigate cases through the appellate stage or the incremental chilling of free expression caused by the well-publicized pattern of libel verdicts. *See* Massing, *supra*. Indeed, this high rate of rejection of

when, as here, (*a*) the speech relates to public plaintiffs (in whom the public legitimately has the most interest) and matters of public concern (which are deemed most worthy of protection), and (*b*) the burdens are not tailored in any reasonable sense to the interest in redressing actual injury to reputation. The Court should declare punitive damages in this context unconstitutional.

III. PRESUMED DAMAGES IN PUBLIC-PLAINTIFF/PUBLIC-SPEECH DEFAMATION CASES ALSO VIOLATE THE FIRST AMENDMENT.

The accommodation between First Amendment interests in robust speech and the state interest in redressing reputational injury similarly requires a rule prohibiting presumed damages in public-plaintiff/public-speech defamation cases. Defamation is the only common law tort that permits an award of damages without any evidence of actual loss. *Gertz*, 418 U.S. at 349. This Court has acknowledged the danger inherent in permitting such awards without proof:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

Id. Although the Court has suggested that it might permit a *private* plaintiff to recover presumed damages upon proof of "actual malice," *id.*, the heightened interests in public-plaintiff/public-speech cases call for a stricter rule abandoning such damages altogether. *See, e.g., Rosenbloom*, 403 U.S. at 82-86

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awards vividly illustrates the standardlessness with which juries exercise their discretion to award punitive damages—a discretion that "unnecessarily exacerbates the danger of media self-censorship . . . ." *Gertz*, 418 U.S. at 350.

(Marshall, J., dissenting); Arkin & Granquist, *supra*, 68 Colum. L. Rev. at 1488.

Presumed damages, by definition, are inherently standardless, for they exist in the complete absence of proof of injury. The result of this standardlessness has been chaos in the courts, with trial and appellate courts consistently slashing or overturning jury verdicts[6] while often confessing the arbitrariness of their own review. The instant case vividly illustrates the problem. In picking the round number of $1,000,000 for presumed damages, the Court of Appeals admitted that its assessment of injury was "very inexact," "somewhat arbitrary," "difficult at best," and "speculati[ve]."[7] App. at 41a, 47a. Other courts have made similar confessions. *See, e.g., Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 538 (10th Cir. 1987). Such guesswork awards are particularly offensive in cases involving public plaintiffs and public speech.

The state interest in compensating plaintiffs for actual injury to reputation—the only interest that the Court has recognized as offsetting the press's First Amendment rights—can be fully protected without permitting awards of presumed damages in public-plaintiff/public-speech cases. This Court has defined "actual injury" as including not only "out-of-pocket loss" but also "impairment of reputation and standing in the community," even in the absence of "evidence which assigns an actual dollar value to the injury." *Gertz*, 418 U.S. at 350. That approach to defining injury fully satisfies the interest in assuring fair compensation for harm.

Moreover, any actual injury suffered by a public plaintiff such as respondent can readily be proved by conventional evidentiary means, making a rule permitting presumed damages entirely unnecessary. Respondent could have proved special

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6 *See* LDRC Study at 4, 21-30 (only 20% of defamation damage awards remained intact after appeal).

7 The court also incomprehensibly explained that $1,000,000, "on the facts of this case," was merely "sizable" but not "substantial." App. at 46a.

damages (if it suffered any) by introducing evidence of lost sales or costly disruption within its organization. It could have proved general damage (if any) to its reputation by presenting direct evidence from customers, or expert testimony about public opinion polls, as is frequently done in other kinds of cases. *See, e.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875 (2d Cir. 1986) (relying on survey evidence to prove public's state of mind on issue of product similarity).[8] Indeed, proof of reputational injury through such mechanisms should be *easier* for public plaintiffs who seek to establish damage as a result of widely circulated news reports than for private plaintiffs.

Presumed damages are not subject to any reasonable limitations. They are in no sense necessary. They unwarrantedly permit recovery of unsupportable and arbitrarily selected sums by public plaintiffs who have presented *no* evidence of actual injury. This Court should reject such damages as inconsistent with profound countervailing First Amendment considerations.

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8 Although the court below rejected respondent's evidence of emotional harm "because a corporation is not capable of mental suffering, which ordinarily will be an important component of an individual's damage award for libel," App. at 40a n.10, an individual plaintiff could easily enlist psychiatrists to prove any such harm.

CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the decision below, and should declare presumed and punitive damages unconstitutional in defamation actions brought by public plaintiffs and involving speech about matters of public interest.

Dated: March 14, 1988

Respectfully submitted,

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I, James C. Goodale, a member of the Bar of this Court, hereby certify that I caused three copies of the annexed Motion for Leave to File Brief as Amici Curiae and Brief of Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox Television Stations Inc., The Hearst Corporation, National Broadcasting Company, Inc., Newsweek, Inc., The New York Times Company, Time, Inc., and The Washington Post as Amici Curiae in Support of Petitioners, to be served on March 14, 1988, by express mail (postage prepaid) and hand delivery, respectively, upon the following counsel:

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should a libel defendant be immune from presumed and punitive damages for false statements made with knowledge of falsity or reckless disregard of the truth, and with express malice toward the plaintiff, merely because the plaintiff is a "public figure" and the statements allegedly involved a matter of "public concern"?

2. Is there any reason to disturb an award of compensatory and punitive damages confirmed after *de novo* review by the Court of Appeals, where: (a) petitioners published to a total audience of 4.6 million people the false charge that respondent was using an immoral advertising strategy employing "pot, wine, beer and sex" to "hook" children on cigarettes; (b) petitioners acted with actual, as well as express, malice; and (c) there was substantial direct and circumstantial evidence of actual injury to respondent's reputation?

3. Should this Court examine the consistent findings of the jury, the District Court and the unanimous Court of Appeals—which reviewed the evidence without deference to the verdict—that petitioners acted with actual malice, where: (a) petitioners admitted they knew the charges in their broadcast were false; (b) petitioners' investigation showed the broadcast was false; and (c) petitioners destroyed selected portions of key documents during the litigation and testified falsely at trial concerning destruction of the documents?

LIST OF PARTIES AND RULE 28.1 LIST

The parties are listed in the petition. Respondent Brown & Williamson Tobacco Corporation, a Delaware corporation, is wholly-owned by BATUS, Inc. of Louisville, Kentucky; BATUS, Inc. is wholly-owned by B.A.T. Industries, plc of the United Kingdom, a publicly-traded corporation.

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BRIEF IN OPPOSITION

Preliminary Statement

Petitioners ask this Court to create a new constitutional immunity for what is perhaps the least deserving category of speech—falsehoods published with both actual and express malice. The petition raises no legitimate constitutional issue, unless this Court is prepared to replace *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)—a case reaffirmed last month in *Hustler Magazine, Inc.* v. *Falwell*, 56 U.S.L.W. 4180 (U.S. Feb. 24, 1988)—with a near-absolute privilege to defame public figures. Neither this Court nor any Court of Appeals has ever endorsed petitioners' radical view. Such a policy, while no doubt in the economic interest of publishers, would prejudice every public figure, small and great. It would, in the end, disserve everyone—except those who own printing presses.

In this case, the *New York Times* rule was applied by a jury, a District Court and a unanimous Court of Appeals with meticulous care over five years of litigation. The Seventh Circuit panel reviewed—*de novo* and without deference to the verdict—*every* element of respondent's proof, from falsity to damages. What it found was truly a record of press abuse. In a "special report" broadcast four times on Chicago's then-leading news station, petitioners falsely announced to a television audience of 2.5 million that respondent Brown & Williamson Tobacco Corporation was running an immoral advertising campaign using "pot, wine, beer and sex" to "hook" children on cigarettes—themes consciously designed to shock the audience, injure Brown & Williamson, and increase CBS's Nielsens during the national ratings "sweeps" then in progress.

After suit was brought, petitioners clumsily destroyed evidence of their misconduct—destroying only the incriminating *portions* of key documents—and lied about their conduct on the stand. After a close review of the record, the Court of Appeals pointedly noted that the CBS broadcaster "did not accurately testify about his state of mind at the time of the broadcast." (App. 35a-36a) As for the explanation of petitioners' researcher concerning the destroyed evidence, the Court concluded "that even a cursory review of his story reveals that the jury was justified in finding that it was a *complete fabrication*." (App. 30a; emphasis added)

Petitioners erroneously portray this as a test case, posing the question whether presumed and punitive damages are available without proof of "actual injury." But the courts below never addressed that question, because Brown & Williamson presented direct evidence of reputational injury within the meaning of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Petitioners' suggestion that no actual injury was caused by a libel of this character, communicated to millions of people, is fatuous.

Petitioners are as far from the mark when they seek review of the actual malice issue. The record is replete with evidence of knowing and reckless conduct. After the painstaking work of

two courts below, there is no reason for this Court to spend its time triple-checking the verdict.

This case creates no precedent on damages, actual malice or any other question. Petitioners have identified no confusion or debate among the Courts of Appeals that requires intervention by this Court, and they have failed to show why the States should be prohibited from applying their laws where the press broadcasts false statements with malice. In a November 29, 1985 editorial following the liability trial in this case, the Chicago *Sun-Times*—surely not a rabid press critic—wrote that "the Jacobson verdict stakes out no new legal ground. The verdict erodes not one whit of our constitutional freedom." The American press, said the *Sun-Times*, "does not enjoy, nor should it enjoy, the freedom to be intentionally (or recklessly) inaccurate."

Petitioners (and the other influential media organizations who wish to file an amicus brief) seek, for their own selfish ends, to draw a constitutional cloak over intentional press misconduct. Even in cases of malicious falsehood, petitioners would deprive libel victims of damages rules which, this Court has recognized, are necessary to compensate for the inherent difficulty of proving reputational injury. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985). Lacking an effective remedy for defamation, anyone within the increasingly elastic class of "public figures" would be a defenseless target for press abuse. This Court has never placed so trifling a value on reputation. We respectfully submit that the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Summing up its *de novo* review of the record, a unanimous panel of the Court of Appeals wrote:

> [I]t is unfortunate that we are forced to conclude that this case does not involve freedom of the press. Rather, it is one in which there is clear and convincing evidence that a local television journalist acted with actual malice when he

> made false statements about Brown & Williamson Tobacco Corporation. Because false statements of fact made with actual malice are not protected by the First Amendment, this court is required to affirm the district court's finding that Jacobson and CBS libeled Brown & Williamson.

(App. 49a)

The Broadcast

In November 1981 and March 1982, petitioners broadcast four times, to a television audience of 2.5 million in the Chicago area, a "special report" on the cigarette industry containing a malicious libel directed at Brown & Williamson. In 1984, the libel was republished in an issue of the *Saturday Evening Post* seen by 2.1 million readers. (App. 39a) As the Court of Appeals found in its 1983 opinion holding the broadcast libelous *per se*, "[a]ccusing a cigarette company of what many people consider the immoral strategy of enticing children to smoke—enticing them by advertising that employs themes exploitive of adolescent vulnerability—is likely to harm the company." (App. 63a) The Court's view was borne out by Brown & Williamson's proof at trial, including direct evidence of reputational injury.

Although petitioners now label it "commentary," the broadcast was promoted and delivered as an investigative news report. The last in a three-part series concerning the tobacco industry, the libelous broadcast focused on the alleged efforts of cigarette manufacturers to advertise to young people. CBS promoted it with teaser ads declaring: "Tobacco Industry Hooks Children . . . Tonight at 10:00." When the report was broadcast, news reader Harry Porterfield introduced petitioner Walter Jacobson, CBS's co-anchorman, as follows: "For the past two nights in Perspective, Walter has been *reporting* on the companies that make cigarettes and the clout they carry in Washington. Tonight he has the last in his series of *special reports*, a look at *how the cigarette business gets its customers*." (App. 129a; emphasis added)

The camera turned to Jacobson, who reported that the tobacco industry had been spending "a billion dollars a year for bigger and better ways to sell cigarettes" to the "youth of America." (App. 129a) He discussed several specific examples of cigarette advertising, including film clips and pictures of actual ads. Jacobson then capped the broadcast with a detailed description of an advertising campaign allegedly being used by Brown & Williamson's Viceroy brand:

> The cigarette business insists, in fact, it will swear up and down in public, it is not selling cigarettes to children; that if children are smoking (which they are, more than ever before), it's not the fault of the cigarette business. Who knows whose fault it is, says the cigarette business.
>
> That's what Viceroy is saying. Who knows whose fault it is that children are smoking? It's not ours. Well, there is a confidential report on cigarette advertising in the files of the federal government right now, a Viceroy advertising. The Viceroy strategy for attracting young people (starters, they are called) to smoking.
>
> "For the young smoker a cigarette falls into the same category with wine, beer, shaving, or wearing a bra," says the Viceroy strategy. "A declaration of independence and striving for self-identity. Therefore, an attempt should be made," says Viceroy, "to present the cigarette as an initiation into the adult world, to present the cigarette as an illicit pleasure, a basic symbol of the growing-up maturity process. An attempt should be made," says [sic] the Viceroy slicksters, "to relate the cigarette to pot, wine, beer, sex. Do not communicate health or health-related points."
>
> That's the strategy of the cigarette-slicksters, the cigarette business which is insisting in public . . . We are not selling cigarettes to children.
>
> They're not slicksters. They're liars.

(App. 130a-31a)

The Trial Evidence

At trial, CBS counsel opened to the jury by promising that petitioners would prove the truth of Jacobson's statements about Viceroy advertising—that Viceroy had really published "pot, wine, beer and sex" ads. That defense collapsed in the middle of trial under the weight of evidence to the contrary. CBS switched to the new theory that Jacobson never actually accused Brown & Williamson of *anything* in the broadcast, that he was merely providing a vague "commentary" about cigarettes and youth. Thus, the petition filed in this Court claims that the broadcast "was not intended to describe current Viceroy advertising, but was intended to support [petitioners'] opinion that cigarette marketing reflects a conscious strategy to appeal to young people . . ." (Pet. at 7)

As the jury and two courts below found, this interpretation of the broadcast is pure sophistry. The broadcast "supported" petitioners' alleged opinions by making the specific charge that Brown & Williamson was running actual ads. This "commentary" detailed a series of *actual* advertising plans, featuring the falsehoods about Viceroy. Jacobson asserted specifically that Viceroy was inducing young people to smoke. The courts below found that the "entire broadcast dealt with methods *actually used* by the cigarette industry to entice children to smoking . . ." (App. 35a; emphasis in original) "Only advertising that children see can persuade them of anything . . ." (*Id.*) Jacobson "stated that the cigarette companies were liars because they were in fact selling cigarettes to children. And the clear message is that Viceroy was doing this through the use of its advertising that relates the cigarette to pot, wine, beer, and sex." (*Id.*) The District Court and Court of Appeals agreed it was "incredible" that Jacobson conveyed this message "inadvertently." (App. 35a)

This is not a case in which petitioners could have believed, in good faith, in an innocent interpretation of the libel. Indeed, the Court of Appeals noted that Jacobson "did not accurately testify about his state of mind at the time of the broadcast." (App. 35a-36a)

Petitioners' mid-trial re-interpretation of the broadcast coincided neatly with the failure of their case on falsity and actual malice. Brown & Williamson put before the jury every Viceroy ad published over a six-year period. Petitioners' witnesses did find evocations of sex and drugs in those ads, but the testimony was so far-fetched that the gallery laughed and petitioners reversed their trial strategy. The testimony showed, moreover, that petitioners knew before they went on the air that there were no "pot, wine, beer and sex" ads. The FTC Staff Report on which the broadcast purportedly relied said *nothing* about actual "pot, wine, beer and sex" ads. (App. 24a) Although petitioners stress the newspaper articles and other materials gathered in their pre-broadcast "investigation," none of those documents indicated that Brown & Williamson had run a single offending ad.

Before it aired the broadcast, CBS knew that the "pot, wine, beer and sex" "campaign" was no more than language lifted out of context from a report prepared in 1975—six years before the broadcast—by a consultant hired by Brown & Williamson's advertising agency. Petitioners conceded they were told unequivocally by a Brown & Williamson representative that the company had immediately rejected the consultant's suggestion, never published or commissioned any ads based upon it, and fired the advertising agency. Jacobson's assistant Michael Radutzky, who performed all the "research" for the broadcast, testified that he looked at "zillions" of ads to find an example of the alleged strategy. His search turned up nothing. But for Jacobson—a broadcaster who, CBS advertises, "pulls no punches" and "will make you angry"—the "pot, wine, beer and sex" theme was too inviting to pass up. Because no examples of the offending ads could be found, petitioners illustrated the broadcast with Brown & Williamson ads showing two packs of Viceroys alongside a golf club and ball. As Judge Posner put it in the Seventh Circuit's 1983 opinion, "the connection

between golf and a strategy of enticing children is obscure." (App. 69a)[1]

At trial, Jacobson eventually conceded the issue of actual malice, when he admitted on the stand that he never believed that Brown & Williamson had run any "pot, wine, beer and sex" ads. (App. 33a-35a) In the face of overwhelming evidence, Jacobson could hardly do otherwise. As CBS counsel finally admitted in closing argument, the idea that Brown & Williamson had actually published such ads was "ridiculous."

Destruction of Evidence

Just as irresponsible as petitioners' false broadcast was their conduct during the litigation. After suit was brought, petitioners selectively destroyed crucial evidence, and then gave perjured testimony attempting to explain how key portions of documents had "disappeared." CBS researcher Radutzky admitted that, after this case was filed, he destroyed the vast bulk of his file—including all the notes of his "investigation," *portions* of the FTC Staff Report that was a critical source for the broadcast, and *portions* of a sample broadcast script. Radutzky testified that he made extensive handwritten notes on his copy of the Staff Report, but the annotated pages of the Report concerning Viceroy were *missing*. Similarly, of the 18 original pages of the sample script, only three were produced, none dealing with Viceroy. The Court of Appeals found that, "[a]s 'luck' would have it," Radutzky "only destroyed the parts of

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1 It is no coincidence that the broadcast was aired during a "sweeps" period—one of three months each year when national ratings services measure the viewership of each American television station. The pressure to increase sweeps ratings is enormous, because those ratings are a key determinant of advertising rates. Internal CBS documents show that it has a policy of broadcasting sweeps "news" stories that are "aggressive," "good dirt/confrontation/sexy/exciting." In addition to the tobacco series at issue here, CBS sweeps news features—known as "topicals"—have included "Teenage Sex," "Parent Beating," and "Cancer Cures."

the documents that would have been relevant to this litigation." (App. 29a)

Radutzky's "explanation" of this chain of coincidences was, according to the Seventh Circuit, "complete fabrication." (App. 30a) Radutzky claimed he destroyed the documents as part of a general housecleaning. But, the Court noted, "[n]obody cleans house as selectively as Radutzky did." (App. 31a) Nor could Radutzky explain why his "housecleaning" extended to *Jacobson's* desk as well as his own, or why Radutzky was "cleaning" Jacobson's workspace after he had left his job in that section of the newsroom to take on another position at CBS. (App. 31a) The Court added that Radutzky's claim that he thought the case had been terminated was not credible, coming from a veteran journalist who majored in history in college, and worked " 'constantly' on stories involving legal matters." (App. 30a)

The Seventh Circuit determined that "the evidence overwhelmingly supports an inference that Radutzky destroyed the documents in bad faith." (App. 32a)

The Decisions Below

Brown & Williamson filed suit on March 16, 1982. Four months later, in a two-paragraph opinion, the District Court granted petitioners' motion to dismiss "for the reasons set forth in [petitioners'] memoranda." (App. 125a) That summary disposition was reversed in 1983 by the Court of Appeals. 713 F.2d 262 (7th Cir. 1983) (App. 55a). The unanimous panel held that the broadcast was "libel *per se* in the traditional sense." (App. 60a, 63a) Noting several respects in which the broadcast deviated from the FTC Staff Report, the Court also held that the jury could find the broadcast was not a "fair summary" of the Report. (App. 27a-28a)

In November and December 1985, a bifurcated trial was held in the United States District Court for the Northern District of Illinois. After two weeks of testimony, a jury of eight returned a four-part special verdict finding that Brown & Williamson

had proved every element of its libel claim, and that the broadcast was not a fair summary of the Staff Report. The jury then heard a week-long damages case. Brown & Williamson presented the testimony of five witnesses who demonstrated that the broadcast had damaged the company's reputation among customers, suppliers—and even its own employees—in the Chicago area and beyond. The jury returned a verdict of $3 million compensatory damages against both petitioners, $2 million punitive damages against CBS and $50,000 punitive damages against Jacobson. In awarding punitive damages, the jury found that petitioners had acted with common-law express malice, as well as *New York Times* actual malice.

On petitioners' post-trial motions, the District Court independently reviewed the record and affirmed each of the jury's findings on liability. 644 F. Supp. 1240 (N.D. Ill. 1986) (App. 77a). It upheld the punitive damages awards, but struck all but $1 of the compensatory damages verdict, because Brown & Williamson had failed to show pecuniary damages—lost sales or profits. (App. 114a-15a) On appeal, the Seventh Circuit carefully studied the entire record in detail. 827 F.2d 1119 (7th Cir. 1987) (App. 1a). It conducted a *de novo* review of the evidence on all issues, giving essentially "no deference" to the jury's findings. (App. 17a) It thus went beyond the appellate review standards prescribed by this Court in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). *See Connaughton* v. *Harte Hanks Communications, Inc.*, ____ F.2d ____, 14 Media L. Rep. (BNA) 2209, 2222 (6th Cir., Jan. 28, 1988) (*Bose de novo* review extends only to the "ultimate conclusion" of actual malice, not to subsidiary credibility determinations, and not to issues other than actual malice).

In a detailed opinion, the Court of Appeals held that the record fully supported liability and the punitive damages awards. It reversed the District Court's decision to strike the compensatory damages award, finding that the lower court erroneously required Brown & Williamson to prove pecuniary, as opposed to reputational, injury. (App. 41a) As this Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), a defamation

plaintiff is not limited to "out-of-pocket loss," but may also recover for "impairment of reputation and standing in the community," even without "evidence which assigns an actual dollar value to the injury." After examining at length the evidence of actual injury, the Court of Appeals fixed compensatory damages at $1 million—a modest sum given the viciousness of the libel and its circulation to 4.6 million persons. (App. 39a, 46a-47a)[2]

REASONS FOR DENYING THE WRIT

1. The awards of compensatory and punitive damages are fully supported by the record. Petitioners' contention that no "actual injury" was proven ignores the extensive evidence presented below, and incorrectly equates reputational injury with pecuniary damages. Publication of petitioners' lurid charges to a total of 4.6 million people caused Brown & Williamson grave injury. The award of punitive damages—equal to .0013 of CBS's net worth and less than .01 of Jacobson's—was supported by findings of *both* actual and express malice, and richly justified by petitioners' outrageous conduct.

2. Petitioners' attacks on the constitutionality of presumed and punitive damages where actual malice is shown are baseless. In *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985), this Court endorsed presumed damages in view of the "experience and judgment of history" that specific proof is difficult even where "it is all but certain that serious harm has resulted in fact." And *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967), squarely rejected the argument pressed by petitioners that the media should be exempted from punitive damages in a public figure case concerning speech of public concern. Petitioners have failed to identify a single relevant decision adopting their views, much less an active controversy among the Courts of Appeals.

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2 The courts below also rejected without hesitation petitioners' argument that the broadcast was protected "opinion." As shown above, the broadcast leveled specific factual charges at Brown & Williamson.

3. Petitioners' willful disregard of the facts learned in their "investigation" and their egregious misconduct amply justify—indeed, compel—a finding of actual malice. There is no legitimate reason for this Court to add a new level of review to the unanimous conclusions of eight jurors and four federal judges.

This case presents no "special and important reasons beyond the academic or the episodic" to merit certiorari. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

I

THE DAMAGE AWARDS RAISE NO ISSUE THAT MERITS REVIEW

"False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine, Inc.* v. *Falwell*, 56 U.S.L.W. 4180, 4181 (U.S. Feb. 24, 1988). This case involves the lowest rung in the hierarchy of speech—statements determined to be false, and made with actual and express malice. In seeking constitutional protection for their misconduct, petitioners ignore the caution of *Herbert* v. *Lando*, 441 U.S. 153, 172 (1979): "Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter the publication of unprotected material threatening injury to individual reputation." This Court has consistently rejected attempts to expand *New York Times* into an absolute shield for the press.[3] Indeed,

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3 For example, the Court has time and again held that First Amendment interests do not justify heightened procedural protections for libel defendants. *Calder* v. *Jones*, 465 U.S. 783, 790-91 (1984) (no special jurisdictional rules); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780 n. 12 (1984) ("[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no First Amendment privilege bars inquiry into editorial process).

some members of the Court have asserted that the prohibitive actual malice standard trenches upon the compelling "interest of those who have been defamed in vindicating their reputation." *Dun & Bradstreet*, 472 U.S. at 767 (White, J., concurring).

Brown & Williamson was required by the courts below to meet all the strict requisites of *New York Times* and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Indeed, the District Court went *beyond* those precedents by instructing the jury that punitive damages could be awarded only on a finding of express, common-law malice, in addition to *New York Times* actual malice. Once it is established that a publication is false—"there is no constitutional value in false statements of fact," *Gertz*, 418 U.S. at 340—and uttered with actual malice, the press forfeits any claim to constitutional protection. The Court held in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 152-53 (1967) that:

> [N]either the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press.

Seven years after *Curtis*, in *Gertz*, this Court crafted the rule that presumed and punitive damages are not recoverable unless actual malice is proven. 418 U.S. at 349. Every Court of Appeals to pass on the question has interpreted *Gertz* to mean that, when actual malice is shown, the normal damage rules of libel law apply without restriction. (*See infra* at 15, 19) Just a few weeks ago, this Court stressed that *New York Times* and its progeny do not "mean that *any* speech about a public figure is immune from sanction in the form of damages." *Hustler Magazine, Inc.*, 56 U.S.L.W. at 4181 (emphasis in original).

Petitioners' suggestion that actual malice is an unsuitable test for enhanced libel damages is nothing less than a frontal assault on *New York Times*, *Gertz* and a host of other cases. For 24

years, this Court has relied on the concept of actual malice to mark the boundary of federal intrusion into state libel law. And, with *Hustler*, the Court has put actual malice into service to limit the reach of the tort of intentional infliction of emotional distress. Petitioners are wrong in their assertion that the States have no interest in permitting damages in excess of "actual injury" against irresponsible press defendants. To the contrary, the damage limitations of *Gertz* do not apply where actual malice is proven, "for where such malice is present there is no good-faith attempt to point out real abuses to the public. There is only an unsubstantiated attack on the character, reputation and good name of a particular individual." *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (footnote omitted).

There is no legitimate reason to extend protection to statements that are not only false, but maliciously so. The American press already enjoys extraordinary insulation from liability. Even studies by observers sympathetic to the press have documented the media's arrogance and remarkable insensitivity to criticism. *See* R. Bezanson, G. Cranberg and J. Soloski, *Libel Law and the Press: Myth and Reality* 40-51 (1987). That attitude is, at least in part, an undesirable by-product of the *New York Times* rule. In this context, adoption of petitioners' views can only encourage irremediable injury to future subjects of press reports.

A. The Award of Compensatory Damages is Fully Supported in Fact and in Law

Petitioners ask this Court to limit drastically the centuries-old doctrine of presumed damages. That request flies in the face of the Court's endorsement of presumed damages in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In that case, not involving speech of "public concern," presumed damages were available merely on a showing of *negligence*. The *Dun & Bradstreet* Court observed:

> The rationale of the common-law rules has been the experience and judgment of history that "proof of actual dam-

> age will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, Comment b, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective.

Id. at 760-61 (citations omitted).

Presumed damages do not represent, as petitioners contend, recovery distinct from real, reputational injury. Rather, they merely "approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 2545 (1986). *See also* R. Sack, *Libel, Slander, and Related Problems* 347 (1980). No more than a natural and necessary inference from the trial proof, presumed damages are restrained by the good sense of the jury, and, as this case illustrates, the careful scrutiny of reviewing courts. Consistent with these principles, the lower courts have not hesitated to approve presumed damages awards. *See, e.g.*, *Gertz* v. *Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("because there was evidence of actual malice . . . Illinois law would permit, and the Constitution would not prohibit, presumed damages."); *Carson* v. *Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Price* v. *Viking Press, Inc.*, 625 F. Supp. 641, 650 (D. Minn. 1985).

We hasten to add that the compensatory damages awarded Brown & Williamson here rest only in small measure on a presumption of injury. It is noteworthy that, over Brown & Williamson's objection, the jury was told nothing about any "presumption" of injury. Instead, it was instructed to award "only such damages as will reasonably compensate [respondent] for such injuries and damages" sustained as a "proximate

result" of the broadcast. Brown & Williamson's damages were supported by direct proof. As the Court of Appeals predicted in its 1983 opinion:

> Accusing a cigarette company of what many people consider the immoral strategy of enticing children to smoke—enticing them by advertising that employs themes exploitive of adolescent vulnerability—is likely to harm the company. It may make it harder for the company to fend off hostile government regulation and may invite rejection of the company's product by angry parents who smoke but may not want their children to do so. These harms cannot easily be measured, but so long as some harm is highly likely the difficulty of measurement is an additional reason, under the modern functional approach of the Illinois courts, for finding libel *per se* rather than insisting on proof of special damage.

(App. 63a)

Thus, the testimony at trial demonstrated the pervasive effect of the broadcast in the Chicago area. The Seventh Circuit's 1987 decision summarized the evidence of reputational injury as follows:

> First, Brown & Williamson's general counsel testified that after the broadcast there were calls from the field sales force indicating that their contacts were asking "how in the world could Brown & Williamson have done such a thing." Second, a department sales manager for Brown & Williamson testified that sales managers in the Chicago area had received negative comments from distributors, retailers, and consumers. The reports he received indicated that the sales staff had been disrupted in their normal activities by questions from retailers and consumers about the broadcast. Third, the former Vice President of Marketing for Brown & Williamson testified that the company had a reputation it cared about and that he believed that Viceroy's customers care about the reputation of the company from which they buy cigarettes. He also testified that the company's reputation among governmental entities

> was important because the cigarette industry is such a closely regulated industry. Fourth, the company introduced evidence that the Perspective (including its rebroadcasts) was seen by over 2.5 million people in the Chicago area. In addition, over two million people read a 1984 article in the *Saturday Evening Post* which repeated some of the most damaging portions of the Perspective.

(App. 39a) In addition, a Chicago cigarette wholesaler unaffiliated with Brown & Williamson testified about the industry's affairs, and the impact and circulation of petitioners' libel in the Chicago community.

Petitioners' claim that their libel caused no "actual injury" is astonishing. In fact, the broadcast was all the more damaging because of petitioners' promotional efforts designed to create an image of CBS and Jacobson as reliable, credible sources of news. In a pretrial memorandum, petitioners offered to stipulate that "WBBM news programs and Mr. Jacobson's Perspectives are perceived to be reliable sources of information and that WBBM's audience *believes* what WBBM broadcasts" (emphasis added). As the Court of Appeals noted, the broadcast was made "in one of the largest television markets in the country," by "a veteran journalist who was trusted by the public and promoted by his employer as someone who 'always leave[s] you informed.' " (App. 46a) Furthermore, "the text of the broadcast carried a very substantial sting that must have hurt both the reputation of Brown & Williamson and its parent company (which as CBS's counsel pointed out at trial owns one of the most respected department stores in Chicago) [Marshall Field's]." (*Id.*)

Brown & Williamson proved "impairment of reputation and standing in the community," *Gertz*, 418 U.S. at 350, through direct testimony. The damage inflicted was massive because the libel was vicious, widely circulated and broadcast repeatedly on Chicago's then-most popular news program. There is no basis for petitioners' attack on the compensatory damages award.

B. The Punitive Damages Awards Are Fully Justified

Petitioners ask the Court to limit punitive damages to "cases of truly malicious conduct involving deliberate lies or calculated falsehoods." (Pet. at 19) The jury and the two courts below all recognized this as *just* such a case. CBS's egregious misconduct, both before and after the broadcast, mandated a punitive damages award.

As this Court held in *Curtis*, specifically rejecting a constitutional challenge, "punitive damages serve a wholly legitimate purpose in the protection of individual reputation," 388 U.S. at 161, and "the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts . . . and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted." *Id.* at 160. In *Davis* v. *Schuchat*, 510 F.2d 731, 737-38 (D.C. Cir. 1975), the court wrote:

> As Justice Brennan recognized in *Rosenbloom*, the First Amendment requires that press and speech comment on matters of public interest be given the wide latitude granted by the *Times* standard. Once that latitude is exceeded, however, we fail to perceive that any further purpose is served by eliminating traditional punitive damages, which have always been subject to correction for excessiveness.

Under the precedents of this Court, as well as Illinois law, punitive damages may be constitutionally awarded in a libel case upon a showing of actual malice. *Gertz*, 418 U.S. at 349; *Fopay* v. *Noveroske*, 31 Ill. App. 3d 182, 334 N.E.2d 79, 92 (5th Dist. 1975). In this case, the District Court required even more—proof of common-law malice—and Brown & Williamson met that heavy burden. (App. 122a)

Petitioners present no authority for their contention that a libel defendant should be immunized from punitive damages solely because the victim was a public figure, and/or the libel concerned a matter of public interest. Such a rule would excuse libel defendants from the full consequences of conduct such as

that evidenced here: publication of a calculated lie for the purpose of injuring respondent and hyping CBS's ratings. Moreover, after the jury verdict on liability, petitioners defiantly proclaimed that they would continue their irresponsible conduct. That recalcitrance further justified punitive damages. *See Goldwater* v. *Ginzburg*, 414 F.2d 324, 341 n.27 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

There is no shortage of cases upholding punitive damages in situations involving public figures and matters of public concern. *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1029-30 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley* v. *Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (punitive damages available even where no more than nominal compensatory damages awarded); *Carson* v. *Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 478-79 (9th Cir. 1977); *Davis* v. *Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975); *Goldwater* v. *Ginzburg*, 414 F.2d at 340-41. *See also Brown & Williamson Tobacco Corp.* v. *Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983) ("actual, general, and punitive" damages recoverable on proof of actual malice).

Petitioners' claim that that actual malice does not alone justify punitive damages is no more than a matter of academic interest in this case. The courts below also found proof of *express* malice. (App. 122a) The authorities discussed above show that actual malice is indeed sufficient for punitive damages, but that issue is not presented on this record.

Petitioners do not and cannot contend that the punitive damage awards—representing minute fractions of petitioners' great wealth—were in any sense excessive. Brown & Williamson's attorneys' fees at the time of trial, a relevant factor under Illinois law, alone amounted to more than two-thirds of the punitive damages awards. (App. 123a) Drawing on all this evidence, the District Court and the Seventh Circuit upheld the awards without hesitation. (App. 47a-48a)

C. The Damage Award Presents No Eighth or Fourteenth Amendment Issue

No more availing is petitioners' argument that the damage awards offend the Fourteenth and Eighth Amendments. There is no "constitutional flaw" (Pet. at 27) in this case because, as discussed above, there is clear and convincing proof of actual malice, substantial proof of actual injury to Brown & Williamson's reputation, and compelling evidence of common-law malice. Nor is there any "gross disproportion" between the compensatory and punitive damage awards. None of petitioners' authorities discussing the Fourteenth and Eighth Amendments are apposite.[4]

Petitioners' complaint about "standardless and deferential appellate review" of First Amendment cases is meritless. The reversal rate in libel cases is staggeringly high and, more importantly, the Court of Appeals in this case made a searching review of the record. Far from being "deferential," the Seventh Circuit reviewed *de novo* every aspect of the record, and slashed the compensatory damages award by two-thirds. In view of their gross misconduct, it ill-behooves petitioners to question the constitutional validity of this award or the diligence of the courts below.

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4 *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), did not even reach the issue of whether an excessive punitive damage award may violate the Fourteenth and Eighth Amendments. And *Banker's Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (oral argument Nov. 30, 1987), involves the issue of whether an award of punitive damages that is "grossly disproportional" to the award of actual damages constitutes an excessive fine prohibited by the Eighth Amendment. Petitioners do not argue, nor could they, that an issue of proportion is presented here. The punitive damages awards in this case clearly are not excessive or unduly burdensome for petitioners. In addition, as one court has held, the Excessive Fines clause "has no application to a civil proceeding involving a punitive claim ancillary to a civil cause of action." *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187, 217 (Colo. 1984) (*en banc*).

II

THE JURY AND TWO LOWER COURTS EACH CORRECTLY FOUND ACTUAL MALICE

Petitioners and respondent have litigated actual malice five times in this case, always with the same result. The District Court found actual malice on three occasions, denying CBS's motions for summary judgment, directed verdict and judgment notwithstanding the verdict. The jury found actual malice in response to a special interrogatory. The Court of Appeals found actual malice in its painstaking 1987 opinion. Petitioners raise the issue here only out of reflex.

It is difficult to imagine a more "clear and compelling" case of actual malice. We briefly summarize the evidence here, and respectfully refer the Court to the detailed opinions of the courts below.

1. *Petitioners' Admission*. Jacobson conceded on the stand that he never believed Brown & Williamson had ever published a "pot, wine, beer and sex" advertisement. As the courts below held, it is "inconceivable" petitioners did not intend to state in the broadcast that respondent was indeed circulating such ads. Jacobson's testimony thus "constitutes an admission on the issue of actual doubt or reckless disregard of the falsity of the broadcast." (App. 95a) The fact-finders below firmly rejected petitioners' jesuitical re-interpretation of the broadcast. *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), on which petitioners rely, concerned a "rational interpretation" of a document that "bristled with ambiguities." 401 U.S. at 290. It does not apply to the incredible interpretation of the broadcast that petitioners cooked up in the heat of trial.

2. *Deliberate Distortion of the FTC Staff Report*. Petitioners knew from the plain language of the FTC Staff Report—their main source—that "pot, wine, beer and sex" did not describe a real ad campaign. It was instead an observation from a six-year old report prepared by a consultant hired by Brown & Williamson's outside advertising agency. Yet the broadcast portrayed the Staff Report as proof that Brown & Williamson had en-

dorsed this "strategy" and was currently running "pot, wine, beer and sex" ads.

3. *Petitioners' Own Investigation Proved Falsity.* All the evidence turned up in Radutzky's investigation showed that the broadcast was false. None of the news articles Radutzky gathered asserted that Brown & Williamson had ever published a "pot, wine, beer and sex" ad. The Brown & Williamson spokesman with whom Radutzky spoke said explicitly that the company had rejected the "strategy" and fired its advertising agency. (Radutzky chose not to call the agency itself.) And, despite his review of "zillions" of cigarette ads, Radutzky was unable to come up with a single example of the offending advertising.

4. *Selective Destruction of Evidence and False Trial Testimony.* Perhaps the most compelling evidence of actual malice was petitioners' bad faith, selective destruction of evidence, and their false trial testimony about the circumstances of the destruction. Petitioners now brazenly contend that their act of bad faith should not be held against them, and that no inference should be drawn from the destruction of crucial evidence. That, of course, is just the result Radutzky hoped for when he purged his files of damning documents. By no stretch of the imagination does the First Amendment require society to condone obstruction and perjury when accomplished by the press.[5]

On this record, no further consideration of actual malice is warranted.

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5 Petitioners' assertion notwithstanding, both CBS and Jacobson were properly held responsible for the conduct of their employee, Radutzky, and his malice is imputed to them. Restatement (Second) of Agency §§ 219(2), 228(1) (1958); *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 564, 566-67 (1982). Petitioners' contention that an employer is not responsible for actions of an employee which are "contrary to policy" is frivolous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
March 16, 1988

Respectfully submitted,

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No. 87-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,
Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondent Brown & Williamson Tobacco Corp. ("B&W") argues essentially four reasons why a Writ of Certiorari should be denied in this case:

(1) because the constitutionality of presumed and punitive damages in public figure/public issue libel cases has already been decided (Br. in Opp. 11, 18);[1]

(2) because the damages described by the Court of Appeals as presumed damages "not required to be proved by evidence" (App. 41a), were actually compensatory damages based on "direct proof" of "grave" and "massive" injury to B&W (Br. in Opp. 11, 17);

(3) because the punitive damage award upheld by the Court of Appeals solely on the basis of actual malice

[1] The following abbrevitaions are used in this brief. Respondent's Br in Opposition, ("Br. in Opp."); Appendix to Petition, ("App."); Petition for Certiorari ("Pet.").

(App. 47a) was actually based on "findings of *both* actual and express malice" (Br. in Opp. 11, emphasis in original); and

(4) because the misconduct of petitioners was so "gross," "egregious," "outrageous" and "irresponsible" that the Court should not review the case. (Br. in Opp. 12, *passim*).

The basic question raised by the petition is whether, under any circumstances, presumed and punitive damages in public figure/public issue libel cases can be reconciled with the heightened protection required by the First Amendment. Therefore, any case that squarely presents the issue will necessarily involve findings and allegations of actual malice. Otherwise, under *Gertz*,[2] there would be no award of presumed and punitive damages to review. Thus, even if B&W's version of the facts were true (which, emphatically, it is not), this would not be a reason to deny certiorari. It would merely reinforce the conclusion that this case presents all elements necessary for the Court to finally resolve this important constitutional issue.[3]

REPLY TO RESPONDENT'S ARGUMENTS

I. THE CONSTITUTIONALITY OF PRESUMED AND PUNITIVE DAMAGES IN PUBLIC FIGURE/PUBLIC ISSUE LIBEL CASES HAS NOT BEEN DECIDED BY THIS COURT

The petition, at pages 9-10 and 15, sets out the manner in which this issue was left open by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), both cases involving *private* figures. B&W's Brief in Opposition does not attempt to answer

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[2] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[3] It might even be argued that the kind of egregious conduct described by B&W would bring the issue into sharper focus, providing even more reason to grant review.

these points, but blindly cites the plurality opinions in *Dun & Bradstreet* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), for the proposition that the Court has already "squarely rejected" petitioners' arguments. (Br. in Opp. 11.)

B&W's choice of these two authorities is particularly inappropriate. The opinion in *Dun & Bradstreet* carefully distinguished the purely *private* speech at issue in that case from "speech on matters of *public* concern" and "libel actions brought by *public* persons." 472 U.S. at 756, 758 (discussed at Pet. 10-11). In addition, five of the Justices in that case expressed reservations about the role of presumed and punitive damages in such libel actions. *See* 472 U.S. at 771 (White, J., concurring in the judgment), 793-94 (Brennan, J., dissenting) (discussed at Pet. 10 n.10).

The pre-*Gertz* opinion in *Curtis Publishing* on which B&W relies was authored by Justice Harlan, who later expressly retreated from the reasoning of that opinion on the very point for which it is cited by B&W—the constitutionality of punitive damages.[4]

B&W also argues that there is no controversy among the circuit courts because "[e]very Court of Appeals to pass on the question has interpreted *Gertz* to mean that, when actual malice is shown, the normal damage rules of libel law apply without restriction." (Br. in Opp. 11, 19.) But this result-oriented survey ignores the fact that the majority of opinions cited by B&W express uncertainty on the issue. For example, in *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), the court expressly recognized:

> It may be that *Gertz v. Robert Welch, Inc.*, [*supra*], and its underlying concern . . . will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure,

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[4] *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 72 n.3 (1971) (Harlan, J., dissenting) (quoted at Pet. 10 n.11).

but the court felt compelled by its own prior decisions to permit punitive damages "absent clear word from the Court to the contrary." *Id.* at 897. Similarly, in *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977) the Ninth Circuit recognized that the Supreme Court "has left open the question of whether [punitive damages] can be awarded in situations in which the high and protective standard of actual malice has been met." *Id.* at 478. *Davis v. Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975), and *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976), also cited by B&W, found only that support for such awards might be implied from language in *Gertz.*

The possibility that constitutionally-suspect presumed and punitive damage awards are being upheld by lower courts on the basis of nothing more than the *silence* of this Court on the question is a far more compelling reason to grant review than any technical conflict among the circuits. Whatever the ultimate outcome of the Court's review might be, the First and Fourteenth Amendments mandate more precise guidance on this issue.

II. THE AWARD OF PRESUMED DAMAGES WAS NOT BASED ON DIRECT EVIDENCE OF ACTUAL INJURY

B&W argues that the presumed damage issue is not really before this Court because B&W proved "grave" and "massive" injury to its reputation with *direct* evidence. (Br. in Opp. 11, 15-17.) The argument conveniently ignores the fact that at trial B&W chose to hide behind second- and third-hand hearsay on the issue of damage to its reputation, thus preventing cross-examination on the question. The real effect, if any, the broadcast might have had and the real cause of the alleged damage, if any, were safely insulated from view.[5] The Dis-

[5] One of the practical criticisms levelled at presumed damages is the fact that it eliminates causation as an issue. *See* Anderson,

trict Court properly rejected the "evidence" as hearsay (App. 117a), and the Court of Appeals did not disturb this ruling. Instead, the Seventh Circuit simply exercised its own discretion to award $1,000,000, recognizing that "this is a very inexact and somewhat arbitrary process . . . . inherent in the doctrine of presumed damages." (App. 47a; *see also* 41a & n.11.) The extensive quotations from both Seventh Circuit decisions at pages 16 and 17 of B&W's Brief are not a recognition that damages were established by direct proof, as B&W asserts. They are nothing more than the circuit court's own rationalization for finding libel *per se* and awarding presumed damages.

The issue is not, as B&W argues, whether it should be required to prove pecuniary damages as opposed to reputational injury (*see* Br. in Opp. 11), although that may well be a legitimate question in the case of a corporation. *See Dun & Bradstreet*, 472 U.S. at 793 n.16 (Brennan, J., dissenting). The issue is whether B&W is entitled to $1,000,000 without satisfying the requirement of *Gertz* that "all awards must be supported by competent evidence concerning the injury." 418 U.S. at 350. The Court of Appeals' decision to award this amount as presumed damages "not required to be proved by evidence" (App. 41a) places the issue squarely before this Court.

III. THE PUNITIVE DAMAGE AWARD WAS NOT BASED ON A SEPARATE FINDING OF EXPRESS MALICE

B&W argues that the punitive damage issue also is not really before the Court because the award was based on "findings of *both* actual and express malice." Br. in Opp.

Reputation, Compensation and Proof, 25 Wm. & Mary L. Rev. 747, 764 (1984). Without examination of direct evidence there is no way to determine whether the alleged damage may have been caused by publicity of *true* facts (*e.g.*, contents of the FTC Report), opinion (*e.g.*, criticism of the cigarette industry in general), or even publicity already in circulation. *Id.* at 773.

11 (emphasis in original). The argument does not explain exactly how this "express" or "common-law" malice was shown, but the decision of the District Court makes it clear that in this case "express malice" was nothing more than another label for "actual malice":

> "[t]he making of a false accusation, knowing it to be false, could hardly be regarded as otherwise than malicious." A reasonable jury could have concluded that defendants acted with express malice.

App. 122a (citation omitted). This circular logic hardly establishes that "*both* actual and express malice" were shown; it demonstrates only the extraordinary extent to which the court's mechanistic finding of actual malice was allowed to predetermine every remaining issue in the case.

Any doubt as to the basis of the punitive damage award was resolved by the Court of Appeals, which held simply that "[p]unitive damages are available under Illinois law when a plaintiff has proven actual malice" (App. 47a), without any discussion of express or common-law malice.

IV. BROWN & WILLIAMSON'S CHARACTERIZATION OF THE FACTS

As noted at the outset, the uncontrolled rhetoric of B&W's attack on petitioners is irrelevant to the question of whether certiorari should be granted in this case. At the same time, petitioners recognize that the Court may well consider the underlying merits and equities of a case in deciding whether review is justified. If these considerations are colored in any way by misapprehension of the facts, B&W's rhetoric may be anything but harmless. Two examples are adequate to demonstrate the caution with which similar conclusory allegations in B&W's brief should be approached.[6]

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[6] Other examples, including B&W's treatment of the destruction of Radutzky's notes, are discussed at pp. 22-25 of the petition.

A. "Pot, Wine, Beer and Sex" Ads

Throughout its Brief, B&W persists in characterizing the broadcast as a direct accusation that B&W was actually running advertising that featured marijuana, alcohol, and sex-related themes:

> [P]etitioners falsely announced . . . that respondent [B&W] was running an immoral advertising campaign using "pot, wine, beer and sex". . . .

Br. in Opp. 2. *See also* pages 5, 6, 11 n.2, 21. B&W's arguments in support of actual malice rely almost entirely on blind acceptance of these characterizations as fact. *See* Br. in Opp. 21-22. It is therefore critical that the Court review the actual transcript of the entire broadcast (App. 129a-131a) and the relevant excerpt of the FTC Report (App. 134a-137a) to let the evidence speak for itself. The Court will find that the accusation described by B&W simply does not appear. It is not a logical reading in the context of the broadcast as a whole,[7] and it is not, under any interpretation, the clear and intentional accusation that B&W would have the Court believe.

B. B&W's "Unequivocal" Denial

B&W claims that petitioners *conceded* they were told unequivocally "that the company had immediately re-

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[7] The broadcast presents three clear themes. It begins with a visual catalog of marketing techniques used by Marlboro, Benson & Hedges, and other manufacturers to attract the attention of young people to their products and brand names. This is followed by the second section or transition describing the cigarette industry's denials that it is intentionally appealing to children. The third section presents the FTC Report description of the "Viceroy strategy" to refute the industry's denials and to support Jacobson's premise and opinion that techniques like the ones shown at the beginning of the broadcast were part of a conscious appeal to young people. What was important to this premise was the FTC's disclosure of a specific strategy that was blatant in its description of how to manipulate the desires and insecurities of young potential smokers.

jected the consultant's suggestion, never published or commissioned any ads based upon it, and fired the advertising agency." Br. in Opp. 7. Petitioners have conceded nothing of the sort. B&W's denial was anything but "unequivocal," hedged with phrases that B&W had "*thus far* been unable to find copies," and that "*to the best of our knowledge* no ads *as described by the memo* were ever actually published." Pl's. Ex. 10. In all likelihood, B&W realized that closer examination would refute the kind of unequivocal denial now asserted in its brief.

B&W documents and evidence at trial[8] established that B&W did not "immediately reject" the MARC strategy, but abandoned it only after fourteen months of intensive research and actual test market advertising failed to show any appreciable Viceroy market increase. Although B&W may have rejected the "ridiculous" idea of blatantly showing "pot, wine, beer and sex" in its advertising, it most certainly did not reject the basic MARC strategy of appealing to young "starters" by emphasizing a "free and easy, hedonistic lifestyle" in settings that would appeal to "the vast majority of young people" (App. 137a). The advertising agency was finally fired from the Viceroy account (but retained for B&W's Kool advertising) after its efforts to implement the strategy proved unsuccessful,[9] twenty-one months after B&W received the initial MARC report.

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[8] This evidence is reflected in Defendants' Exhibits 60, 61 and Proposed Exhibit 57, excluded by the District Court. *See* n.9, *infra*.

[9] Proposed Exhibit 57, the final report by MARC on its market research that demonstrated the direct link between the initial MARC proposal and the advertising eventually run in the test markets, was excluded by the District Court. Ironically, one of the reasons given was that some of the ads "might under some circumstances be regarded as rather lurid." Tr. 439. B&W was thus able to argue with impunity, and continues to argue, that the test market ads had nothing to do with the initial MARC strategy. (Br. in Opp. 7.)

CONCLUSION

B&W's Brief in Opposition is a compelling example of one reason why this case has reached this Court. From the very beginning both jurors and judges have been overwhelmed with appeals to the emotions [10] at the expense of the facts. The broadcast has been portrayed as something it was not and interpreted in a manner that virtually guaranteed the finding of actual malice and the imposition of damages. As a result, what began as an example of "vehement, caustic, and unpleasantly sharp" criticism of the cigarette industry, in the classic tradition of the First Amendment, has reached this Court as a multi-million dollar judgment against the critic and the broadcaster. The need for a writ of certiorari and independent review by this Court could hardly be greater.

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[10] As Justice Douglas suggested in his dissent in *Gertz*, 418 U.S. at 359, the influence of emotion and prejudice is not confined to the jury. *See also* Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 Wm. & Mary L. Rev. 793, 801, 808 (1984) (excessive libel awards may reflect in part "localized judicial distaste for certain publishers" and the judges' "understandable, but constitutionally improper, distaste for the defendant's publication."). In this regard, it cannot be denied that Walter Jacobson is a controversial figure in Chicago. His style and commentary are definitely capable of angering not only viewers (*see* App. 3a), but jurors and judges as well.